

767
No. 2171

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(*In Three Volumes.*)

JAMES T. BARRON,

Appellant,

VS.

CLAIRE J. ALEXANDER,

Appellee.

VOLUME II.

(Pages 257 to 496, Inclusive.)

Upon Appeal from the United States District Court for
the District of Alaska, Division No. 1.

FILED

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(Testimony of James T. Barron.)

Q. (By Mr. JENNINGS.) Well, all right, if I don't understand. What did you get this upland for, Mr. Barron?

A. I got it for a fish station and a mooring ground and to use—anything in our line of business.

Q. What do you mean by fish station? You didn't expect to put a cannery on there.

A. No, to use it for a fish-trap.

Q. That is what you got it for—a fish-trap?

A. Yes, sir; not only, have a station for my boats, and so forth.

Q. What is a fish station?

A. A fish station is where you have got your mooring grounds and harbor and you can build a station there in case you wish to have a house there for your fishermen or anything pertaining to the business.

Q. All right. Mr. Barron, you got this property on the 8th day of March, 1907, didn't you?

A. That is the deed.

COURT.—1908.

Mr. WINN.—1911.

A. The deed was signed at that time.

Q. (By Mr. JENNINGS.) What is the date of the deed?

COURT.—March 8, 1911. [235]

Q. (By Mr. JENNINGS.) You never did anything, from that time on, to put anything on the upland or to build a station there?

A. Because the upland was taken, and I didn't want to do anything to injure Victor Robertson's rights.

(Testimony of James T. Barron.)

Q. Victor Robertson never did anything?

A. No.

Q. But the Alaska Packers' Association never had anything?

A. But I got the Alaska Packers' rights before Victor Robertson's.

Q. The Alaska Packers first had it? A. Yes.

Q. What did they do?

A. They built a fish-trap.

Q. Now, you wanted this upland because you thought the upland gave you a control of the tide land where you wanted a fish-trap?

A. I wanted too a mooring ground, or anything I wanted.

Q. Mooring ground. Have you got a mooring ground at your other traps?

A. No, because that is situated so closely to the cannery, that I wanted to make that without having any trap on it.

Q. Well, you are only five miles from Funter Bay anyhow. Why don't you run into Funter Bay?

A. Because you can't on account of the north wind. It is impossible to take a tow in face of the north wind.

Q. You mean to say that in towing logs to Funter Bay would get up as far as this little harbor and then the north wind would become so strong you couldn't get any farther? A. Yes.

Q. Just get right up to this harbor and the north wind would increase in velocity so much you have got to run into the harbor?

(Testimony of James T. Barron.)

A. Yes; it surely does, if you will notice— [236]

Q. All right.

Mr. WINN.—That is all?

Mr. JENNINGS.—Yes.

Redirect Examination.

Q. (By Mr. WINN.) Now, Mr. Barron, I will ask you if five or six miles in a stiff head wind with a tow of logs is a considerable distance? A. Yes.

Q. Now, they have talked a good deal about if you couldn't run into Hawk Inlet. Now, as I understand, your boats generally come down this way and cut across here (indicating)? A. Yes.

Q. From this point. Now, then, how does the wind—withdraw that question—you started to explain once to Mr. Cheney as to how the wind, say, from the point—now, listen to my question—where survey 804 is down to Hawk Inlet, compared with what the wind is from survey 804 up to Funter Bay when there is a north wind blowing. Now, how is that on there?

A. The north wind blows at a tremendous velocity between these two points here (indicating).

Q. What two points?

A. This cannery—right down to say—

Q. Well, say between Funter Bay and—

A. Funter Bay and here it sweeps there, and this is a protection—this—this cove is headed between them.

Q. What cove is a protection?

A. This makes a rocky straight beach and that goes out westward, you see, and that helps the cove

(Testimony of James T. Barron.)

considerable in a north wind.

Q. Yes. [237]

A. The wind dies out, quiet about Point Augustine and he can cross over and come along this shore because the wind, north wind dies suddenly there, goes off here and can always come up here.

Q. As far as survey 804?

A. Yes, and then stop because it is impossible to face an ordinary north wind; it carries a big sea and fierce wind, so there is the place where the north wind reaches the highest velocity right along here.

Q. Then, as you answered this question of Mr. Jennings, this piece of property and this harbor in there is valuable to you for several purposes other than with your fish business? A. Yes.

Q. Either for a trap, fish or mooring ground, building a trap? A. Yes, sir.

Q. And those were the objects that lead you to take it up—this piece of property?

A. Yes; had it on my mind for years.

Q. Now, this part of Chatham Straits that is on the—the east side of the lead of this trap leads right out to the open sea, to the open straits, does it not?

A. Yes.

Q. Yes, sir.

A. There is—it is the ocean off from there and goes into a small bay and then the open strait.

Q. Now, I will ask you, Mr. Barron, what is it that makes this ground in and about the trap and between the trap and the peninsula marked “bare rock,” what makes that better anchorage ground than this

(Testimony of James T. Barron.)

out to the eastward of that?

A. Because you are closer to the lee shore.

Q. Does the tide there make this—carrying sand in there and [238] making it better bottom?

A. Yes.

Mr. CHENEY.—Very leading.

Mr. WINN.—Well, so it is.

Q. Mr. Cheney said to you that coming in around the point was a tremendous tide came in there and then sweeps off the bare rock. I will ask you if that tide coming in that way would have anything to do with making that better mooring ground?

A. Yes, it would.

Q. I say if the tide sweeps in there and strikes up against this peninsula and comes off—I will ask you if, Mr. Barron, on account of the tide coming in that line would have anything to do with making that ground better mooring ground?

A. Well, I suppose accumulates; evidently must be mooring ground there, because piles can be driven there.

Q. Now, Mr. Cheney was asking you something about if Mr. Barker didn't wire you something concerning Mr. Alexander's intention of building this fish trap before you got this deed from Robertson. I will ask you where Mr. Barker was when you got this deed from Robertson? A. He was in Alaska.

Q. When the deed was made out?

A. Well, he knew the deed was to be made out, but it was delayed. I went to Portland and I didn't get back to Seattle. The deed was made out for

(Testimony of James T. Barron.)

three or four days before that, but I had left. I had told Barker that everything was fixed and I had paid that—bought that from Robertson and that everything was settled. Knew of no danger; knew of nobody coming in and interfering with our station.

Q. Well, was Robertson present at that time when you closed this transaction with Robertson? [239]

A. Oh, yes.

COURT.—Barker.

Mr. WINN.—Barker.

A. I don't remember. He might remember. I don't remember all about it. I had filled it out and after getting the letter—I made out the deed, I think, in Portland. I think the deed must have been made about the first of March, and I said might be left up to George T. Myers'—the check with the money there as soon as Robertson executed the mortgage, I mean gave me the transfer.

Q. Yes. Now, I believe you stated in your direct examination, if not, I will ask you now as to what time of the year that you do mostly, about all of your towing of piles all down this coast of Admiralty Island? A. About the 1st of March.

COURT.—The witness has already testified to that.

WITNESS.—Yes.

Q. (By Mr. WINN.) Now, did I ask you what the prevailing wind was out there at this time?

A. In March?

Mr. CHENEY.—Why, you asked the witness that question.

(Testimony of James T. Barron.)

Mr. WINN.—Well, I didn't know whether I did or not.

Q. Now, Mr. Barron, you testified, I believe, in answer to a question of Mr. Cheney's that—about how far you would have to anchor out from the upland of this survey 804 in case that you would go in there with a steamer like the "Anna Barron," with a tow of logs. I don't know whether you answered that clearly or not.

A. You couldn't go there at all; impossible the way the trap is completed, completely cuts you out of a harbor.

Q. Indicate—how is that, Mr. Barron?

A. Because the trap is right across the harbor there. Put your [240] nose into it.

Q. About how far from your shore line of the homestead claim would you have to anchor out—

A. Have to.

Q. —with a tow of logs such as she usually carries and what length of rope have to have?

A. Well, of course, shorten your tow-line—she brings any piles up; if had five or six sections of piles averaging 100 feet apart, that is five or six hundred feet and you could shorten up your tow-line in the harbor and then the "Anna Barron" is 100 feet and the anchorage would be about 200 feet, perfectly safe 200 feet, and that would be about six or seven hundred feet have to have to be sure there in order to swing. The trap would be absolutely in the way. Couldn't do anything in there with a raft of logs at the present time.

(Testimony of James T. Barron.)

Q. Well, now, suppose you was going in there to seek shelter with the "Anna Barron" with a tow and it was in the night-time?

A. Wouldn't dare go in there.

Mr. JENNINGS.—Just a moment. I want to make a motion here at this time and I think might shorten things—that Judge Winn has devoted a great deal of time here to showing that he couldn't get in there with a tow of logs and that it would be a menace to navigation, and so forth, and it is good holding ground and a good harbor of refuge, all of which goes to the question as to whether or not this trap would be a menace to navigation, that hasn't anything to do with whether has a right to an injunction or not; whether this is a menace to navigation; whether you can get in there with logs or not; don't try this suit on that ground at all. What has that got to do with his ingress or egress from his upland to the water? [241]

COURT.—Well, it shows, I suppose, and that goes to that—what is meant by reasonable access is such access as will enable him to get in and out of whatever place he desires.

Mr. JENNINGS.—But then as to what about tows of logs, towing logs in there and getting in there as a harbor of refuge; not as to whether or not can get in there and moor up at a wharf.

Mr. CHENEY.—If that is a public harbor, any citizen in Alaska could bring the suit just as well as Mr. Barron, if it is a menace to navigation; that is a public right and have to prosecute this case as re-

(Testimony of James T. Barron.)

lator to the United States Government.

Mr. WINN.—Yes, sir, and I have alleged in the pleadings that he bought this for any and all purposes.

Mr. JENNINGS.—You don't want to get into your upland as a harbor of refuge; couldn't go to the upland; that isn't the point you are making for as a harbor of refuge. It is not to get to the upland; nothing to do with the upland.

Mr. WINN.—It is practically a harbor for the purposes I have pleaded it.

Mr. JENNINGS.—Well, I am going to move to strike it all out as irrelevant and immaterial to the issues of this case.

COURT.—The only object is it gives the Court enlightenment as to what is the reasonable access. Of course, I concur with you that the plaintiff has no more right than anybody else has, but if his evidence tends to show that his access has been obstructed or has been obstructed by the defendant, the evidence may go in for that purpose and that is the only purpose for which it will be considered. [242]

Mr. CHENEY.—Another proposition, if the Court please, that might suggest itself. If Mr. Barron had that up, as Judge Winn says, and had actually used it for a harbor for logs, he could be enjoined by other people—if it is a good harbor, he would be obstructing the harbor. When a man owns the upland doesn't give him any right to the harbor. It is a public harbor. Everybody has a right to it.

COURT.—I will hear the evidence for the purpose

(Testimony of James T. Barron.)

indicated by the Court.

Mr. WINN.—I will state to the Court this, for the purpose of this evidence and so forth, since the ruling indicated now by your Honor, so you can see some of the purpose of this testimony: Since the ruling in the Hampton case a different condition of affairs existed in Alaska until—

COURT.—Since what?

Mr. WINN.—Since the ruling in the Hampton case there is a different condition of affairs and a different rule and which I will show that Hampton case doesn't apply to this—in a criminal case in the language that Judge Morrow used in the decision.

Q. Now, I will ask you if suppose you wanted to go in—to get into your upland—of course, you can't run the “Anna Barron” on the shore, but to go in there anywhere to anchor in front of your upland, in order to reach your upland with freight or anything you wanted to reach it for, now I want you to state as to whether or not, just with the “Anna Barron” alone, if you can go in there with any stress of weather, whether you can go in and anchor safely with this fish-trap the way it is constructed now?

A. No; I wouldn't dare to; wouldn't allow my captains to.

Mr. JENNINGS.—You went over that already three times. [243]

Mr. WINN.—That question wasn't asked, your Honor. I have asked in regard to reaching his upland. I believe I did ask him in the night-time; yes, sir. That is all.

(Testimony of James T. Barron.)

COURT.—Any further cross-examination?

Mr. JENNINGS.—Yes, sir. [244]

Recross-examination.

Q. (By Mr. JENNINGS.) Just a moment. Why, wouldn't you, Mr. Barron?

A. Because the current is too swift there, liable to be a swift current and in such waters when backing up or turning around will fetch up against the beach or the trap; haven't got room.

Q. I place my hand, for the sake of the record, on a point midway between the line of Mr. Alexander's lead and that easterly line—the easterly line of claim 804. I will ask you why you couldn't build a wharf obliquely, running to the east?

A. Well, I wouldn't be in front of my property; be in front of somebody else's property.

Q. You could do that?

A. I don't think so; might be able to drive a pile; I don't think so, because I think the Alaska Packers—

Q. Never mind about what you think. I am talking about what you know, not what you think.

Mr. WINN.—He answered the question, your Honor; said he thought he couldn't do it.

Q. (By Mr. JENNINGS.) I didn't ask what you thought. A. I would have to find out.

Q. If you know of any reason why you couldn't drive a wharf obliquely in the east, beginning at the point where I place my finger, as I now said?

A. Yes, but—

Mr. WINN.—That is the same objection, if it

(Testimony of James T. Barron.)

please the Court. I don't think that any proposition would compel Mr. Barron to wharf out in front of other people's property that isn't his. While your Honor may have held some persons may have, now he is saying obliquely going all in front of some other property. [245]

COURT.—I don't mean to say the requested questions will control the case. The object is to learn all I can how it is possible to get in there. For that reason he may answer the question.

Mr. WINN.—Exception.

Q. (By Mr. JENNINGS.) Do you know of any reason? A. I hardly think so.

Q. Do you know of any reason why you couldn't wharf out?

A. I am satisfied there is a reason that you can't drive piles out there, because the Alaska Packers had their trap in the same position as Mr. Alexander's and I understand from my foreman and my trap-men that is the only place you can drive piles in there; consequently, can't put a wharf except at that particular place where the trap is.

Mr. JENNINGS.—I move to strike that all out, because is trying to get something that somebody told him.

A. I knew it from my men who explained it to me.

COURT.—The testimony won't do any harm, Mr. Jennings. It may stand.

Q. (By Mr. JENNINGS.) All right. Then, that is all you know about it—what somebody has told you? A. I never drove a trap out there.

(Testimony of James T. Barron.)

Q. You never tried to drive a trap out there?

A. No.

Q. Don't know anything about the soundings out there?

A. Only what was represented to me by my men.

Q. Well, the soundings—no trouble as to water—there is plenty of water?

A. The water is very deep; there is 11 fathoms—you can see this map—11 fathoms of water right off there.

Q. Now, just a moment. Now, by driving a wharf that way, you would strike deep water quicker than—
[246]

A. I don't know whether you can drive a trap.

Q. Wharf or landing. You know, Mr. Barron, that they drive wharves in some most inaccessible places; hardly any bottom; sometimes rock?

A. Yes.

Q. Not much trouble to drive a wharf and placing it—but a wharf or landing place for such boats as the “Anna Barron” and the “Kodat”—that doesn't have to have a very awfully strong wharf?

A. You mean to say that in building a wharf might face it on somebody else's property?

Q. Build a wharf so you can get into your 804?

A. That is because I wouldn't be able to go up there. The most reasonable way to build a wharf at the other end is where I have my level land where the beach is at the side.

Q. How is it?

A. That is I prefer that. I couldn't go over by

(Testimony of James T. Barron.)

anybody's property, and I wouldn't have the room there.

Q. (By Mr. BURTON.) What end is that?

COURT.—The easterly.

Mr. WINN.—The south end.

WITNESS.—The southeastern.

Mr. WINN.—Yes; call it the southeastern.

Q. (By Mr. JENNINGS.) I am not asking which is the most feasible, but you contend in the answer this is feasible—that would be the most feasible. Which is feasible?

A. From reports I have had no place you can drive a trap there; if can't drive a trap, can't drive a wharf unless you go to great expense and place them—simply hang them on the rocks.

Q. Even that can be done?

A. But a rather expensive proposition— [247]

Q. A little more expensive, but it isn't an impossibility at all?

A. Could put in an iron dock for that matter.

Q. Did you ever see the dock at Haines?

A. Rather an expensive dock—public dock.

Q. Well, docks are expensive any way wherever you go? A. Some are not as expensive as others.

Q. What do you think would be the difference in cost?

A. I would have to get the size, measurements and everything else.

Q. You never did do that?

A. I have got wharves, plenty of them.

Q. I say you never figured on what would be the

(Testimony of James T. Barron.)

difference in cost between building on your east end?

A. No, I didn't want it put there; that position is not as desirable.

Q. Well, the communication is where?

A. No; a high bluff right in front; can't get on to the water.

Q. The bluff doesn't run right down to the water?

A. Pretty near.

Q. A passageway all along the shore line—this passageway all the way from—

A. Oh, there is a passageway.

Q. —from one end of the claim to the other?

A. But quite perpendicular there.

Q. Well, you heard Mr. Hill's testimony on the stand here Saturday, didn't you? A. Yes.

Q. You know this bluff stops about 125 feet before you get to the water?

A. I know about 100 feet for just a corner of that piece of ground it is all right, but I mean crossing from that to the end of my property.

Q. But you know if you build a wharf at the east end of your [248] claim and your buildings were down to the west end of the claim, can get to it very easily?

A. I don't think I could. I think would have to build a wharf—I think at high tide don't think you could walk from one to the other on the beach.

Q. You wouldn't swear to that?

A. No; I wouldn't swear to that. I never was there at high tide, but so close to it there is very little margin over there.

(Testimony of James T. Barron.)

Q. Yes.

COURT.—Any further cross-examination, gentlemen?

Q. (By Mr. CHENEY.) I just want to ask Mr. Barron about—if anyone was coming with a steamboat down Chatham Straits or up Chatham Straits, they wouldn't have to change their course to get away from this trap Mr. Alexander has in this cove?

A. No, you can't see the trap coming out until you get already, almost opposite, because it is in that cove and hid behind that reef and that bare rock.

Q. Then, this isn't any obstruction to navigation up and down Chatham Straits? A. No.

Q. Unless somebody wanted to go into the harbor?

A. No; unless somebody wanted to go into the harbor.

Q. Now, you know of a couple of traps that you have at the Kitten Islands where the "Georgia" and all other big boats have to change their course to get around your traps in Chatham Straits?

A. Well, it was, but the traps I have now at the Kitten Islands there is plenty of room on the outside there; doesn't run out so far; don't have to change their course because the "Georgia" doesn't run there now.

Q. He doesn't now? [249] A. Only—

Q. But they used to go in there?

A. Well, some of the boats did and some do yet; and got plenty of room for them too.

Q. When did you—when did you first decide to build a wharf out in front of your survey 804 and

(Testimony of James T. Barron.)

gave orders for the building of that wharf?

A. Well, after—at the instance of my counsel here.

Q. That was last year?

A. Yes; last year that—I was down below and I received a cable from Mr. Barker stating the fact that I had better protect my property and build a wharf, and I immediately gave orders to Barker to commence that for the protection of the property.

Q. To protect your property? Now, Mr. Barker telegraphed you to telegraph him that you intended to—

A. That Mr. Burton—

Q. — Wait a minute, Mr. Barron. It is a fact that Mr. Barker telegraphed you on the 28th of March, last year, or the 26th of March last year, and while this suit was on trial here in this court for you to telegraph him substantially as follows: “I intend to build a wharf in front of my survey 804-B. Assemble the piles and pile-driver number one or two” whatever it was “and begin the building of a wharf.” Or substantially words to that effect?

Mr. WINN.—Now, wait; that telegram is here, as I understand, on file, if your Honor please, and I ask that the witness be allowed to see the telegram.

Mr. CHENEY.—It is not on file because it was introduced and read by Mr. Burton but I didn’t insist on it going into the record and Mr. Burton put it in his pocket.

COURT.—If the witness doesn’t remember the contents of [250] the telegram—

WITNESS.—Well, I remember the gist of it.

COURT.—The witness says he remembers the gist

(Testimony of James T. Barron.)

of it. He may answer if he remembers.

Mr. WINN.—The telegram isn't as counsel has indicated. You see he is acting under advice of counsel, which, I think, would probably change it.

COURT.—Yes; the witness may see it.

WITNESS.—May I read it?

Mr. CHENEY.—Is this the one sent to Mr. Barker or Mr. Barron sent to him?

Mr. WINN.—This is the one Mr. Barron sent to him.

WITNESS.—Shall I read the telegram?

COURT.—It may be read into the record if counsel desires.

A. (By the WITNESS.) “Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804 Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters and that you are sending affidavit to this effect”; and I simply answered.

Q. (By the COURT.) He was directed to?

A. Yes, sir.

Q. (By Mr. CHENEY.) You wired him that you would?

A. Yes; certainly, begin operation immediately.

Q: You haven't that telegram—that is the one wasn't put in the record. It was handed to Mr. Burton?

Mr. WINN.—Want the two offered in evidence?

Mr. CHENEY.—Yes.

COURT.—Very well, may be received.

[Defendant's Exhibit No. 1.]

“Alexander vs. Barron—Deft's Ex. 1—R. E. R.
[251]

POSTAL TELEGRAPH—COMMERCIAL
CABLES.

Clarence H. Mackay, President.

TELEGRAM.

Received at

Main Office, 126 Third Street,
Portland, Oregon.

Telephones: Main 435

Home A1435

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

16.P/D8452

Design Patent No. 40529

E 5694

378

Telephoned to J. T. Barron.

“ by H. E.

“ at 8:15 P.

120 Z BT

55 Collect via Seattle, Wn.

Juneau, Alaska, Mar. 27, 1911.

J. T. Barron,

Wells Fargo Bldg.,

Portland, Org.

Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804, Alaska, out and into deep and navigable waters Chatham Straits for

access from said upland to and into navigable waters and that you are sending affidavit to this effect.

FRED BARKER. 8:08 P. M."

[Defendant's Exhibit No. 2.]

"Alexander vs. Barron—Deft's Ex. 2—RER.
POSTAL TELEGRAPH—COMMERCIAL
CABLES.

(Postal Telegraph)

(Commercial Cables)

Clarence H. Mackay, President.

CABLEGRAM.

Registered Trade-Mark Design Patent No. 36369.
The Postal Telegraph-Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

No.	Time	Check	Route via
		Paid	
		Chg. Thlinket Pkg. Co.	

Send the following Cablegram, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to. [252]

Portland, Ore., Mar. 28, 1911.

To Newark L. Burton, Atty. at Law,
Juneau, Alaska.

It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect.

JAS. T. BARRON."

(Testimony of James T. Barron.)

Q. (By Mr. CHENEY.) I understand you to say, Mr. Barron, that you were told or advised by Mr. Barker to say you were going to build a wharf or commence to build a wharf to protect your property?

A. I was not advised by Mr. Barker. I was advised by Mr. Burton, Newark L. Burton.

Q. Mr. Barker wired you. That was for the purpose of protecting your property? A. Yes, sir.

Q. You had no cannery buildings on this location at that time?

A. No; but it was my intention—

Q. Just answer the question. You had no buildings on the place at that time? A. No.

Q. And you weren't using it for any purpose in connection with the cannery?

A. No; I intended using it for that purpose.

Q. But I say at that time there was nothing on the property at all but a little bit of a shack?

A. Yes; intended to use it as a fishing station.

Mr. CHENEY.—That is all. [253]

Re-redirect Examination.

Q. (By Mr. WINN.) I believe you say you sent this telegram in pursuance to a telegram that you had received from Mr. Barker and which you took to be advice from your attorney who was acting on the trial of that other case, Mr. Barron? A. Yes.

Q. I believe that is all, your Honor. Oh, well, I might ask you the other question: Why, didn't you go on and build a wharf after that?

A. When—after this?

Q. After you got the telegram and after the trap

(Testimony of James T. Barron.)

was put in there.

A. Well, the injunction was dissolved and I concluded I would wait until I had perfected the title and had fully—of course, this late in the season I wasn't able to build any wharf after putting in that trap.

Q. Would the wharf do any good with the trap in there? A. No; not a bit.

Mr. CHENEY.—That is leading and calling for a conclusion.

COURT.—The witness has answered it. Anything further?

Mr. WINN.—Nothing now.

Q. (By the COURT.) I desire to ask you two or three questions, Mr. Barron. I don't think you need that map. Now, I understand you to say that prior to the time you laid any claim to the upland included and embraced within Survey Number 804 you used to pull into this harbor for protection from the winds? A. Yes.

Q. You used it for that purpose, and you think that this trap would be a menace to navigation in that cove because you and the public generally wouldn't have the same opportunity to [254] go in there as though the trap were not there?

A. No; of course, we couldn't go in there with a tow the trap being there, that would be an utter impossibility.

Q. Now, Mr. Barron, let me ask you this question: Do you think—I understand you to say that the trap is in about the same position, that is, in the same

(Testimony of James T. Barron.)

locality, as that put in by the Alaska Packers?

A. Yes. Of course, as near as I can judge.

Q. As near as you can judge? A. Yes.

Q. And I further understand you to say that it was about the only place within that cove where a trap could be constructed?

A. That is what I have been told by several people who had the building of the trap there; also my own men who had made soundings there.

Q. You think the trap is built in a workmanlike manner, do you? A. I think so; yes.

Q. Now, if you should prevail in this suit you would build your trap in the same place?

A. I suppose if going to build a trap there, have to put it there, because no other place.

Q. Now, if you had a trap there wouldn't it be just as difficult for you to get in to the upland as if another man had it?

A. I suppose it would. The question would be with me whether it would be better for me to have a trap there or use it for a mooring grounds.

Q. For a mooring grounds. Now, what is the purpose of your acquisition of this upland? Isn't it for the purpose of acquiring that upland in order to command the property in front of it for the purpose of a trap? Isn't that the sum and substance of this controversy? [255]

A. That is probable, outside the mere fact that I am able, you know, to use it for any purpose I wish.

Q. Yes; but I understood you to say that prior to the acquisition of this land from Robertson that you

(Testimony of James T. Barron.)

intended to locate this very place as a trap-site yourself?

A. But that was before Alexander had built his trap. I didn't know where the particular place was; whether could build at any other place or not; but it is evident from what I have heard that is the only place where it would be practicable to build a trap—just where the Alaska Packers were and where they are now.

Q. Well, then, any trap maintained in that vicinity, in your judgment, would cut off your right of access from your upland? A. Yes.

Q. To deep water navigation? A. Yes, sir.

Q. (By Mr. WINN.) Just a minute. I didn't understand your question, Mr. Barron,—one of them that you answered Judge Lyons about,—whether constructing or building a wharf is the sole purpose that you want the upland for?

A. I answered I wanted it for other purposes—fishing station, mooring ground, and so forth.

Q. And the question whether you would build a fish-trap there or build a wharf there, would depend on whether or not that you chose to use it for one purpose or the other purpose?

A. Yes; whichever I thought properly to my interest.

Mr. WINN.—That is all.

Re-recross-examination.

Q. (By Mr. CHENEY.) I would like to ask Mr. Barron what he means by mooring ground. Just

(Testimony of James T. Barron.)

explain what a mooring ground is, [256] Mr. Barron?

A. Well, a mooring ground, I suppose, is a dolphin driven there; you can anchor your scows or your boats or your pile-driver and also tie up your raft of pilings to. In case our boat was going down to get logs and the north wind was blowing wouldn't be able to get from there to Funter Bay, be able to moor his piles there and then go and get another tow, and not wait for the wind to subside, for the wind has been blowing the last week or two so as to make it impossible for us to bring our piles up.

Q. Now, Mr. Barron, isn't it a fact that all the traps you are operating are located up Chatham Straits and over on Icy Straits and none of them that you own are located east of this particular place or east of this harbor?

A. At the present time, yes; but I don't know what time I would, if I could, drive them at that end.

Q. I don't ask you to come on out somewhere else. Isn't it a fact that they are all located north and over towards Icy Straits and over here toward Point Retreat? A. Yes, at the present time.

Q. Yes. So if you wanted a mooring ground for scows like you have got over there at your cannery at Funter Bay, where you put your big scows up there for the winter, or if you wanted a mooring ground for them to stand or lie at docks, why would you want to go away off down Chatham Straits in the opposite direction from where your traps are located to locate it?

(Testimony of James T. Barron.)

A. If I had the upland I have the privilege of mooring my piles there which I wanted to several times, over there.

Q. Well we are not talking about piles, but scows?

A. Well, I may have scows over there and may give that direction. [257]

Q. Aren't your big scows moored or put on the beach this winter?

A. All on the beach or ways.

Q. Over at Funter Bay? A. Yes.

Q. Well, you have a dolphin farther in, past your cannery there, in the bay, haven't you? A. Yes.

Q. That is where you tied the "Anna Barron" and those boats up this winter?

A. Yes; when in the harbor.

Q. And I don't suppose you want to swear, Mr. Barron, that you consider that a good safe harbor for mooring grounds for the big scows—well, big boats only that can be tied up to that little wharf where the wind sweeps down?

A. Perfectly safe in a north wind.

Q. But the prevailing winds are from Icy Straits and the southeasters. No wind except that wind?

A. Well, when we do—well, most of our towing is in March.

Q. But when you do your towing—I am not talking about towing; I am talking about a place where you put your big scows and anchor them?

A. I don't say I was going to anchor all my scows, but I say if I wanted to I could there; have that right.

(Testimony of James T. Barron.)

Q. And the only time—but first, it is in the winter that the north wind blows? A. Yes.

Q. Well, at the present time and during the summer and fishing season, Mr. Barron, that harbor wouldn't be safe at all for a boat of any kind?

A. No; it wouldn't be safe there in a southeast wind, unless had it tied up to something very strong. [258]

Q. Northwest wind or a southeaster?

A. There is a swell in there.

Q. What?

A. There is a swell in there. If got your mooring piles good and solid hold anything there, because you can tell by the entrance of that trap in there can't be very bad in there any time. The trap is a lighter than any we could build. In part is two by eight, very slight; so if a frame structure like that can stay all winter it is not very bad in there any time.

Q. The Alaska Packers went out?

A. Just simply went out by gradually being eaten out by toredoes. Many piles standing there a long time.

Q. You are willing to say whether they were eaten up by toredoes? A. Well, we know that.

Q. As a matter of fact, you haven't been there very often, Mr. Barron,—you haven't been there very often?

A. I have been often enough. No business to go there very often, particularly matters in this connection.

Mr. CHENEY.—That is all.

(Testimony of James T. Barron.)

Q. (By Mr. JENNINGS.) Well, Mr. Barron, there is one thing I don't understand. There are three propositions you have mentioned you want that land for; one for a trap-site; another because this little cove is a good mooring ground; and another because you want to use the upland as a fishing station. Now, outside of mooring purposes and fish-trap site, what is a fishing station? What do you—what—

A. Well, if you had—

Q. —if you had no fish—if you had no fish-trap there and if—and if the mooring ground in question was out of the way entirely, what—what would make that a good fishing [259] station or why would you use that as a fishing station? Now, just cut out the fish-trap—put that out of your mind and put the mooring purpose out of your mind, and put a place for tow logs out of your mind. Would you still use that as a fishing station if you put all that out?

A. If you eliminated all that, wouldn't have any business there at all. This is my business. If you eliminated the logs we are towing, of course, wouldn't have to go in there to unload any logs, and if we didn't have a fish-trap there, needn't have a watchman or anybody around there. Be nothing there, of course.

Q. Well, then, if you take out—if you haven't got a fish-trap there and if you don't consider the mooring proposition and harbor of refuge, you don't want to build any wharf there at all if those things were out of the way, you wouldn't want to build a wharf there?

(Testimony of James T. Barron.)

A. Yes; if I wasn't interested in this country wouldn't need to go there at all. I think that is a foolish question.

Mr. WINN.—It is eliminating all possible things they could put it to.

WITNESS.—I might as well be in Portland.

COURT.—I think the question, Mr. Barron, counsel is endeavoring to ascertain just what you mean by a fish station. Now, he says eliminate the idea of a fish-trap; eliminate the other advantages of the cove or harbor, then what else do you want it for.

Q. Now, is there any other purpose?

A. Well, he says eliminate the harbor there for towing.

Q. Yes.

A. Well, of course, there is no purpose that covers the whole usage I have had for it. [260]

Mr. JENNINGS.—Well, that is what we wanted.

COURT.—Anything further, gentlemen.

Mr. JENNINGS.—Just a moment.

Q. And if you did have a fish-trap there you would build a house upon the beach as a place for the watchman to live there, that is about all there would be of the fish station? A. I guess so.

Q. You have got a shack or house upon the upland where your watchmen live. That is what you mean by fish station? A. Fish station.

Re-redirect Examination.

Q. (By Mr. WINN.) Now, there was one question you started to explain to Mr. Jennings. I suppose

(Testimony of James T. Barron.)

in the maintenance of this cannery business you are in that you should go down about Hawk Inlet, or any part of that country, and locate any fish-traps, and so forth, then in towing your fish in, your scows, and so forth, up this shore, would this upland and this piece of property be of any value to you?

A. Very valuable.

Q. As yet, I understand, you haven't any down there?

A. No, no; but the chances are as I need more traps I may have them down there; that is prospective.

COURT.—Will take an adjournment at this time, gentlemen, and reconvene at half-past seven. [261]

Seven-thirty P. M., March 18, 1912.

COURT.—Ready to proceed, Mr. Jennings, without Mr. Cheney?

Mr. JENNINGS.—Yes.

COURT.—Very well. Proceed.

Mr. JENNINGS.—I would like to ask Mr. Barron one or two further questions.

COURT.—Will you take the stand, Mr. Barron?

JAMES T. BARRON, plaintiff, heretofore duly sworn, being recalled, testified further as follows:

Cross-examination.

Q. (By Mr. JENNINGS.) Mr. Barron, have you got the telegram that Mr. Barker sent to you, to which the telegram you read this afternoon was a reply?

Mr. WINN.—Both introduced, Mr. Jennings.

WITNESS.—Yes.

Mr. JENNINGS.—No, the other wasn't; not this one.

(Testimony of James T. Barron.)

COURT.—I think so, Mr. Jennings.

Mr. JENNINGS.—I would just like to see it.

Mr. WINN.—I think so. Mr. Barker's and the reply. I think in the case before, your Honor. I think these are office copies, and would like to withdraw them.

COURT.—Very well, the Reporter can make copies of them and then be withdrawn.

Q. (By Mr. JENNINGS.) Now, who wired this telegram to Burton reading as follows—I withdraw that, Mr. Robertson—Mr. Barker's telegram—this reads as follows: "Burton asks that you wire fully that it is your intention at once to build and construct wharf from upland embraced survey 804 Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable [262] waters and that you are sending affidavit to this effect." You replied the next day, that telegram I just read being March 27, 1911, and on March 28, 1911, you wired to Mr. Burton, "Newark L. Burton, attorney at law, Juneau, Alaska. It is my intention to construct at once wharf from upland embraced survey eight hundred four Alaska out and into deep and navigable waters Chatham Straits for access from said upland to and into navigable waters. Am sending by mail affidavit to this effect." Now, is that the first time you ever told Mr. Barker you intended to build a wharf out there?

A. Well, it was on account of my counsel there advising me to protect my property by building a wharf, which I had a perfect right to do.

(Testimony of James T. Barron.)

Q. Your counsel advised you that it was necessary for you to protect your property by building a wharf there? A. Yes.

Q. If your counsel hadn't advised you to that effect you had no thought of building a wharf, did you, Mr. Barron?

A. Well, I had the wharfage privilege on account of owning the upland.

Q. Well, now, just answer my question. If your counsel hadn't advised you it was necessary to protect your property that you build a wharf, you wouldn't have thought of building any wharf out there, would you?

A. Possibly not that quickly or at the present time.

Q. You had no intention at that time of building out any wharf there until you got this telegram from Mr. Barker, did you?

A. I, of course, supposed that the uplands held everything in front of the property and naturally if I had to protect the property by building a wharf I had that privilege of doing so. [263]

Q. You supposed that owning the upland you had the right to wharf out and if it was necessary to protect your property why you would wharf out?

A. Certainly.

Q. But you didn't have any intention at that time, that is, before you got these telegrams, of building any wharf, did you?

A. Well, I might have intended to next season, but I didn't think it was so expeditious—as the occasion required on my part of jumping that location.

(Testimony of James T. Barron.)

Q. Mr. Barron, you didn't need—you didn't need any wharf there at that time in order to enable you to get it?

A. Well, I may have during the season needed the wharf; that was very early in the season.

Q. Yes, you may have needed the wharf if you had put a cannery there and a lot of other things there; of course, have to have a wharf to get in, but you didn't intend to build a cannery there then—you had no intention to build a cannery?

A. No; I had no intention of building a cannery, but I wanted a fish station there.

Q. You had no intention of starting a store—doing anything, except you intended to build a fish-trap out there and to build a place on the shore for the watchmen who take care of it, isn't that right?

A. I intended to build a fish-trap there if for my business interest or reserve the frontage for mooring grounds or build a fish station there or wharf, whichever I thought probably needed in my business.

Q. Well, now, Mr. Barron, you didn't imagine for one minute because you owned the upland nobody else could moor—could run into that harbor as a harbor of refuge. You didn't think the upland was going to give you any such rights as [264] that, did you?

Mr. WINN.—I object to that as calling for a conclusion.

COURT.—Objection overruled.

Mr. WINN.—Exception.

Q. (By Mr. JENNINGS.) You didn't under-

(Testimony of James T. Barron.)

stand that the owning of the upland would give you such control over the harbor that nobody could go in there?

A. I had the best expert advice and I had the uplands and I thought that I had the first right of doing anything I wanted to the property to navigable water.

Q. Yes, I understand, you thought you had—a good many people think that too. You thought that owning the upland gave you the right to build a fish-trap out there, didn't you? A. Yes; or anything.

Q. And control over it?

Mr. WINN.—Let him answer the question now.

A. —or any other thing I wanted to do in front of my property.

Q. (By Mr. JENNINGS.) Yes; anything else?

A. Wharfage, or moorage, or anything else.

Q. But at that time you didn't want to do anything else but build a fish-trap, did you?

A. Well, I don't know; a lot of things considered that we have to in our business; that I can't act too impulsively.

Q. How is that? .

A. I say a lot of things in our business that can't act too impulsively about, do or come to me, conclusions, but this was forced upon me by the jumping of the trap and property and, of course, I wanted to protect my rights by building a wharf out there, as I had the right, I supposed, and have free access to the rest of my property.

Q. Well, now, do you want to build a wharf out there now? [265] A. I do.

(Testimony of James T. Barron.)

Q. If this Court gives you this property are you going to build a wharf out there or a fish-trap?

A. I will build a wharf out there.

Q. What? A. I will build a wharf out there.

Q. What for?

A. Well, that is, of course, to tie up my boats to or moor my piles to; anything pertaining to our business, if I get the premises.

Q. You don't need a wharf to tie up the boats?

A. If I have got the uplands there I have got the privilege of building a wharf out there—I will build a wharf.

Q. With nothing on the shore but a shack?

A. That is all right; can build several shacks if we wish to, that is my province.

Q. Well, do you intend to do it?

A. I can do it if my business requires.

Q. Do you intend to do it? A. I may do it.

Q. You may do it, but do you intend to do it?

A. Well, it depends entirely upon how—how I feel about it if I have the privilege.

Q. How do you feel about it?

Mr. WINN.—I object to the question, if your Honor please. I don't know, of course, if he intends to do. I don't know how far it goes in a matter of this kind. If he is entitled to access to deep water, then that is the only question to decide in the case. Doesn't make any difference whether he intends or not now or any time or some other time. If he has access to deep water he has a right to do that whenever [266] he wants to. I don't think it is

(Testimony of James T. Barron.)

fair for the witness to do it, because there are a lot of conditions. Suppose he had a lot more fish-traps located down that beach somewhere and they towed up his fish, as he does with the "Anna Barron," he would want to go in there and tie up to the wharf. Why, he concludes these other traps are insufficient for his cannery, he may testify to that. Now, then, he says he hasn't an opportunity of looking into that—too many probabilities and improbabilities. I don't believe could enlighten the Court at all. If entitled to access to deep water has been obstructed, seems to me that is the only question in the case. What he may intend to do in the future. He says he is going for business there and anything that may develop. For all we know, as your Honor remembers that in the Hampton case we didn't get that case decided until the fish quit running—maybe some of Mr. Barron's other traps will stop running and he may want to go down there and put in a trap, or may not. Now, I don't believe it is fair to put it to the witness just exactly what he intends to do. I don't believe it will enlighten the Court any.

COURT.—Now, let us see the situation, Judge Winn. The plaintiff in this case is asking for injunctive relief; that the defendant be enjoined from maintaining the structures in front of his upland which he says precludes his access to the highway. It becomes certainly material then for the Court to know what sort of passageway he wants, if it doesn't know. Assume that because a man owns the upland if he owned it for two miles that he could prevent

(Testimony of James T. Barron.)

any structures in front of him regardless of whether or not he wants to appropriate that particular place and should be permitted to appropriate that particular place for a passageway to the highway. Then, [267] what Mr. Barron intends wouldn't be material; but the view that I take of the law is that it isn't a theoretical right of way that a man is entitled to. It is a practical one. One that he needs to appropriate. Then it becomes material to determine what he is going to do with his upland so that the Court may determine from all the evidence submitted whether or not the injunction should be granted at this time. That is the reason it becomes, in my mind, very material to know just exactly what the plaintiff's intentions are. What he wants, in other words, to have the trap removed for by mandatory injunction?

Mr. WINN.—Mr. Burton says he has some suggestions to make.

Mr. BURTON.—If it please the Court, the question in this case is whether or not they are cutting off our access to deep water. The question that he asked the witness goes to asking whether or not he intends to build a wharf. Now, I take it from your Honor's remarks, if the Court please, that his intention whether he intends to build a wharf or not has nothing to do with the case and, even restricting him as you said a while ago that he is not entitled to the whole water-front, nevertheless the same question exists whether this right of ours extends the whole width of the upland. So far as this question

(Testimony of James T. Barron.)

is concerned, here is a question that is put to the witness: "Do you intend to build a wharf at the point you claim your access is?" Now, that is the question they put to him. Now, I contend, if the Court please, that the littoral right, whatever that may consist of, whether it extends the full length of what he claims or not, makes no difference; if there is a littoral right in existence, if that littoral right is to only reach a point on his upland—don't reach the whole claim—then we have shown that the ingress and egress to Chatham Straits is just where this [268] fish-trap is. Now, whether he intends to use that access; whether he intends to use that right, makes no difference; that right exists in him; he can do what he likes with that right; it is a property; something existing in him by virtue of the ownership of the upland; and in this case, as we have tried to show your Honor, that there is only one available place where boats can possibly land to reach that upland. Now, then, is Mr. Barron compelled in order to hold that accessible spot where he can reach his upland to build a wharf—is the question now in this case; that is the point, if the Court please.

COURT.—Yes; that is the point, and in response to that, Mr. Burton, I hold that it is very material. If a littoral right is such a right that a man can transfer, as you say, and prevent everybody else from building in front of him, regardless of whether he wants to appropriate it or not, then the inevitable deduction from that is the man who owns the upland can prevent by mandatory injunction anybody build-

(Testimony of James T. Barron.)

ing or operating anything in front of him, regardless of whether he wants it or not. That is not the law and it has been so declared very positively in the case of Decker versus the Pacific Coast Company.

Mr. BURTON.—In the Decker case, if the Court please, you will remember that had been sold. If the Court will pardon me, a wharf had been built out by the littoral owner—

COURT.—Yes.

Mr. BURTON.— —Now, Decker brings a suit claiming they cut off the access to navigable water. The Court held him to show by the evidence or pleadings that they had cut off that access over the wharf that had been constructed; and the evidence also showed that there was a building immediately [269] in front of the Decker property, which according to that theory should have been removed by the trial court.

COURT.—The only construction that I can place upon the Decker case is that so long as a man has a way out to navigable water he cannot complain *if* anybody else that builds in front of him. If, therefore, he has upland that he has no use for and has no intention to appropriate, he has no reason for the existence of the right of way and no reason to ask a court of equity to provide a right of way for him when there is no evidence to sustain the necessity of such right. I think it is clearly competent. Objection overruled.

Mr. WINN.—We take an exception to your Honor's ruling.

(Testimony of James T. Barron.)

Mr. JENNINGS.—Please read that question, Mr. Robertson.

Q. (Read by Reporter.) How do you feel about it?

Q. (By Mr. JENNINGS.) Mr. Barron, how do you feel about it? How do you feel about it, Mr. Barron; how do you feel about it?

Mr. WINN.—Same objection.

A. I have forgotten the gist of the question before that.

Mr. WINN.—I don't know—taking up so much time.

COURT.—The question is whether you intend to build a wharf.

A. Yes; I intend to build a wharf.

Q. (By Mr. JENNINGS.) You do intend to build a wharf? A. I do. Let me—

Q. What for?

A. I have got a lot of combustibles and two naphtha boats, and I am going to put my combustibles there and have my gasoline boats there, instead of running to the cannery, instead of being around where I have got a plant worth a quarter of a million dollars. I will store it down there.

Q. You are going to build a wharf and house there on this spot [270] for the storage of combustibles?

A. Yes.

Q. By combustibles you don't mean explosives, combustibles, dynamite and things of that kind?

A. No; naphtha.

Q. Naphtha and gasoline? A. Yes.

(Testimony of James T. Barron.)

Q. Things of that kind. Why don't you keep them over at Funter Bay where you have got a good big harbor? A. Too congested at the peninsula.

Q. What are you doing with them now?

A. Well, I have got three gasoline boats there for this summer there and will use the distillate which is very low grade.

Q. How long have you been running the cannery at Funter Bay? A. For ten years.

Q. What have you been doing with your combustibles for the ten years?

A. I have never been running a gasoline launch until last year; never had any distillate until last year.

Q. When did you buy your gasoline launch?

A. Last year.

Q. What time last year?

A. Last spring I changed the "Kodat" into the "Buster."

Q. So, you have got a gasoline launch there that runs by combustibles? A. Yes.

Q. And in order to make your plant complete, Mr. Barron, you knew that by building a—by buying a gasoline launch, you would also have to build a wharf to—wait a minute—to give you access to some land on which you were going to build some bigger houses in order to store this distillate [271] for your gasoline launch? A. Yes.

Mr. WINN.—Object—incompetent, irrelevant and immaterial, and, if it please the Court, not proper recross-examination.

(Testimony of James T. Barron.)

COURT.—Objection overruled.

A. Have to build a wharf some place because have to get away from the cannery and might as well build there as any place else, because it is on our line to Icy Straits; only fifteen or twenty minutes passage from our regular course, run into that place and get out gasoline laid on them.

Q. What was the notice you put up on these piles; these three piles you put out there?

Mr. WINN.—Object to it.

A. I have already answered.

Mr. JENNINGS.—I am just further cross-examining.

Mr. WINN.—But I know he has answered it already. I don't care if he answers.

COURT.—He may answer.

Q. (By Mr. JENNINGS.) Well, if I had, I will ask him again; no objection to asking him again. What was the notice you put on these piles?

A. Location notice.

Q. As a fish-trap site? A. Yes.

Q. Not as a wharf site?

A. Well, never has been our purpose to put up a wharf site; in fact, I didn't own the uplands—didn't own the upland until a few days before the site was jumped.

Q. Then, you didn't intend to build any wharf there until a few days before that trap-site was jumped? [272]

A. Well, I intended to build a wharf there if I have got the authority.

(Testimony of James T. Barron.)

Q. Did you ever apply to anybody for authority to build a wharf there?

A. Well, no; I didn't get the property only a short time before the trap-site was jumped, so, of course, I didn't need to do it.

Q. Did you ever tell Mr. Barker you wanted to build a wharf there?

A. Well, Mr. Barker is only one year in my employ and he was an inside man. He didn't do anything much outside.

Q. Didn't he know you wanted to build a wharf there?

A. Well, as far as the wharf was concerned, I wouldn't build the wharf, unless it was necessary, but I find it is necessary and I am going to build it if I have got authority.

Q. Necessary to protect your property?

A. Well, also, I am going—

Mr. WINN.—Wait, let him answer.

Mr. JENNINGS.—I want him to stop right now.

COURT.—Let him answer. Give the witness a chance.

A. I am going to use it to store combustibles there and eliminate so far as possible fire risks at the cannery.

Q. (By Mr. JENNINGS.) Five miles away from the cannery?

A. Well, it isn't coming from Icy Straits and these gasoline boats run to Icy Straits. It isn't three miles.

Q. Whenever you want distillate going way down there from Funter Bay?

(Testimony of James T. Barron.)

A. It isn't much out of the road; only takes a few minutes.

Q. Just read that question about two questions before that—where I stopped him. You say you wouldn't build the wharf unless it was necessary?

Mr. WINN.—That isn't his answer. [273]

Mr. JENNINGS.—Well, he goes that far.

Mr. WINN.—Let's be fair, if the Court please. Mr. Jennings can put that in much less time and not come back at the witness and ask him "Wasn't that your answer?" I think he ought to be fair to the witness.

COURT.—Yes; the witness answered something else in reference to that same matter, Mr. Jennings, but the witness may explain his answer to it when counsel asks him if he is going to build a wharf if necessary—can explain.

Mr. JENNINGS.—I was going to ask him another question when he said he wouldn't build a wharf unless necessary.

Mr. WINN.—You want to do all the talking.

A. It is necessary for me to build a wharf somewhere and I might as well build down there, because have to get away from the cannery and just as convenient down there as any place I know of, and as far as the few minutes' run down there—we go to Icy Straits and we can go down there—making the deflection and can have it on our wharf and supply our gasoline boats with distillate without any trouble at all.

Q. (By Mr. JENNINGS.) That is what you are

(Testimony of James T. Barron.)

going to do with this five acres of land you have got there instead of building a fish-trap?

A. I don't know that I would. Then, I can, of course, do what I wish with the upland and I think I will build a wharf there.

Q. You think you will build one?

A. Well, I will qualify that. I will say I am going to build a wharf there.

Q. Now, you are going to build one?

A. Yes.

Q. You are not going to have a fish-trap there at all? [274] A. No, not this year.

Q. And you are just going to convert that into a place to store combustibles and abandon the fish-trap idea all together? A. Yes.

Q. Isn't it much more valuable to you as a fish-trap?

A. It may be, but when a jumper comes along you want to protect your property; you want to get within your rights; and if I wanted to use that for a wharf and mooring grounds where I could keep my piles there, I think that is the valuable part of it, because the wharf wouldn't interfere with—with my harbor.

Q. Well? A. It wouldn't go as far.

Q. If it is necessary to protect your property from a jumper you will build a wharf, and if it isn't necessary, you won't?

A. Well, I am going to build a wharf there anyhow, because I need it; might as well build a wharf; have to build a wharf some place, and I am going to build it there for my combustibles.

(Testimony of James T. Barron.)

Q. Didn't you think it was a little strange that you should get a telegram from Mr. Fred Barker, your agent up here, going into such particularities as this: Burton asks—you knew who Burton was at that time, didn't you?

A. I did, certainly; my counsel.

Q. "Burton asks that you wire fully that it is your intention at once"—not sometime in the future, at once—"to build and construct a wharf from the upland embraced in survey number 804 Alaska out and into deep and navigable waters of Chatham Straits for access from said upland to and into navigable waters and that you are sending an affidavit to this effect." Didn't you think that was a little strange? A. No, I didn't. [275]

Q. —that Mr. Barker should wire you in such particularity as to at once wire your attorney in such particularity as that— A. No, I thought—

Q. —just when this case was on?

A. No; I thought that was to protect the property and all what we did was quite within my province of building a wharf there.

Q. You understood from that, Mr. Barron, that was for use in this suit, didn't you?

A. Well, a man if he is hit, you know, why he has to protect himself. A man hits him in the back, why naturally he has to protect himself—

Q. Yes.

A. —and it was the regular thing, for I also had a use for that wharf if I built it. It was my province

(Testimony of James T. Barron.)

according to the instructions of my attorney to follow his advice.

Q. Well, that wasn't your attorney. Fred Barker wasn't your attorney.

A. No; but Burton was my attorney.

Q. (By Mr. BURTON.) Attorney's name was mentioned in the telegram?

A. His name appears first, I guess, on the telegram. I wasn't to wire to Barker; simply to follow advice of my counsel in the matter. I was away, a thousand miles south, and I didn't know what was happening.

Q. (By Mr. JENNINGS.) And you mean to say now that it is your intention to quit the fish-trap—well, let me ask you a question, how many fish-traps would you say you had? A. Twelve last year.

Q. Twelve. Got any wharf to any of them from the shore?

A. Well, it isn't necessary, because no harbor at any of them.

Q. No harbor—no wharf at any of your fish-traps? [276]

A. This is the only harbor we have got there where it is a harbor.

Q. Are there men—are there watchmen living on the beaches—aren't there? A. Now?

Q. Yes. A. Certainly.

Q. Don't need any wharf to get to them at all?

A. Well, then, we have no—there is no protection there at all. They are all points and open channel.

Q. Not, but I am talking—I mean there is no

(Testimony of James T. Barron.)

reason why you should have to have a wharf when there is nothing on the shore but a watchman to protect the trap?

A. Well, but this is different. This is right close to the cannery—a protected harbor and I want, if I can't use it for a fishing privilege, I am surely going to use it for a harbor of refuge for my piling that I have to bring down from the south there. I have at least got ten traps to make this spring and that is of value if I never had a fish-trap there.

Q. Yes, but, Mr. Barron, you may not know it and maybe Judge Winn won't deny it, but you know—I will ask you, Mr. Barron, don't you know—if you don't know that the ownership of the upland wouldn't give you any right to the control of that harbor as a place of refuge to put in your logs? You understand that?

Mr. WINN.—Object—incompetent, irrelevant and immaterial; calling for a conclusion of law, if the Court please. Mr. Jennings says I may deny it. I am not testifying.

COURT.—Yes; that is asking the witness to pass on his legal rights, Mr. Jennings.

Mr. JENNINGS.—I guess that is all.

Mr. WINN.—That is all? [277]

Q. (By Mr. CHENEY.) I want to ask you a question. When you say you might build a wharf there to store gasoline and distillate that you use in your gasoline boats, of course, you would want to use that gasoline and distillate during the summer season while your boat was running? A. Certainly.

(Testimony of James T. Barron.)

Q. Well, now, if you had that stored down in this place that you call a sort of protected harbor, isn't it a fact that there would be days and days in the fishing season, summer season, when a southeaster would be blowing or a westerly be blowing or a northwester be blowing out of Icy Straits, up and down Chatham Straits, when you couldn't get in there to get that gasoline or distillate?

A. No, I don't think so. I think if the harbor—if it had a wharf there perfectly safe to go to the wharf and tie there almost any day.

Q. Even with a big southeaster blowing?

A. Well, even a big southeaster, unless some storm. Then possibly be delayed for twenty-four hours or so. I know by the trap there—if that trap can be built there must be a good harbor, no matter what winds are blowing.

Q. But if you wanted a safe place to store that stuff, why not build a little platform or wharf, which you could build much cheaper over there, right in that good harbor in Funter Bay where you have got your big scows kept there for the winter, anywhere in that bay, just safe enough distance from your cannery so would be no danger? Couldn't you build a wharf there much cheaper and much more protected?

A. No, I couldn't build a wharf there any cheaper than this place for there is so long—I would have to build a wharf there about two or three or four hundred feet, a thousand feet longer pretty nearly, to get to deep water. [278]

Q. But there are a great many places there in

(Testimony of James T. Barron.)

Funter Bay are better protected than this place you are talking about down here?

A. Our peninsula right on line.

Mr. WINN.—I object to that, if it please your Honor, suppose there are other places—maybe somebody else's or maybe on the prohibited territory within eighty rods, couldn't take up, but I don't care for it, only I don't think it is competent and material. I don't think it is.

COURT.—Make it just as short as possible.

Mr. CHENEY.—Just that one question now if I can get an answer.

A. I can build a wharf there just as cheap as any place right on 804, and be just as handy practically.

Q. Well, if your gasoline boat wanted to get gasoline some morning and was going up to brill your trap up towards Point Retreat, where you have three or four traps strung along toward Point Retreat or Lynn Canal, and your boat wanted to get gasoline, would it be handier for your boat to go down Chatham Straits the five miles in an easterly direction—want to go down there and come back?

A. Well, my boat don't brill at all.

Q. That is all right; then we will say if the boats were going up to these points?

A. Well, wouldn't have any business there except simply to make a trap and come back again.

Q. Well, I will ask you this: If a boat was going to get gasoline and make a trip in to Juneau here, wouldn't it be ten miles out of their way to go down to this place where the gasoline was located to get

(Testimony of James T. Barron.)

the gasoline? Now, isn't that so?

A. Maybe on a special occasion, but only once or twice a year would that happen. [279]

Q. But I say it would be ten miles out of the way if you were coming around this way to Juneau?

A. Well, Mr. Cheney, you don't understand me for you don't know anything about the cannery business. I have got propositions—I have got to have a line of traps below Hawk Inlet.

Q. Well, you haven't got any below Hawk Inlet?

A. That wouldn't make what I have in the future. I was out 20,000 cases last year on account of this jumping proposition—I outfitted for that.

Q. That is all right.

A. I intend to have traps down south there.

Q. You haven't got any?

A. I am going to have.

Q. You don't know?

A. I haven't got this wharf either, but I am going to have the wharf.

Q. You don't know whether you can get the traps?

A. Well, I don't know; that it my business.

Q. Well, that is all right, Mr. Barron, but the question was, that I asked you, if you did intend to take your gasoline boat out of Funter Bay and load with gasoline, and the boat was going to make a trip up, say, to that trap toward Point Retreat, or even around Point Retreat towards Juneau, wouldn't that be ten miles out of that boat's way?

A. Yes; that might be so, but I might have several traps down there just on my way, which I am going

(Testimony of James T. Barron.)

to have; which I expect to have, right down in line with this gasoline.

Q. I simply asked you if it was ten miles out of the way if the boat was going to come to Point Retreat?

COURT.—He answered that.

Mr. WINN.—He answered that three times.

[280]

Q. (By Mr. JENNINGS.) He asks what your intention is now. What was your intention at the time you brought this suit? Did you intend at that time to build a wharf?

A. I intended to build a wharf, if necessary, for my mooring grounds, for controlling the uplands, that is the waters abutting the uplands, and use that for a harbor while I was towing my piles and use it for any purpose my business called for.

Q. But at the time you brought the suit did you intend to build a wharf? You can answer that.

Mr. WINN.—I object to that. At the time the suit was brought it was shown that Mr. Barron was a thousand miles away from here and I don't know but what the evidence shows he didn't know the suit was brought until after it was brought. You see this complaint was verified by Mr. Barker and Mr. Barron was not here and I think it has been covered.

Mr. JENNINGS.—I will ask to prove the date.

Mr. WINN.—It seems that when one attorney cross-examines for a while, then the other starts in.

COURT.—If this was a jury case it would be different. I want to find out all I can about this suit and not only do I but any other court that passes

(Testimony of James T. Barron.)

upon it after I pass upon it, will probably want to know just exactly what the suit was brought for and what the intention was at the time the suit was brought.

Mr. BURTON.—I think he has testified to that, if the Court please, at least three or four times.

Mr. JENNINGS.—At the present time.

COURT.—But I don't know as that one matter has been gone into. Maybe it has.

Mr. BURTON.—At the time of the introduction of the telegrams, [281] if the Court please, Mr. Jennings asked that question at least ten times.

COURT.—It may be gone into.

Q. (By Mr. JENNINGS.) Mr. Barron, this suit was verified—the complaint in this case was verified on the 22d day of March, 1911. Now up to that time did you intend to build a wharf there? Did you have—up to that time, did you have any intention of building a wharf on this place?

A. When I took—let me explain for a minute—when I got the Alaska Packers' title to whatever preceding title they had to give, I was going to take the upland—I say that was taken by Victor Robertson, and before I could do anything with that I had to let it lie idle until I saw Victor Robertson and bought his title to the upland. For all the expert advice I had was that I was the owner, that I could get ingress and egress from the upland, to use it for any purpose for which I needed it for. I would be protected and that is why I bought it from Robertson. If—I was going to say, if I was going to take a trap there,

(Testimony of James T. Barron.)

simply use it for a fish-trap and were no protection or anything else I would have built the trap long before I got Victor Robertson's title, but I didn't want to take anybody else's property if he had a shadow of right to the land. I bought it outright from him and that was the reason I didn't build the trap there the year before, for I had the lease from the Alaska Packers, the right to do, because it is common right along for us to protect each other's rights and never interfere with each other's rights, locations, or what you might call it.

Q. Well, now, Mr. Robertson, will you read the question I asked of Mr. Barron?

(Reporter reads:) Mr. Barron, this suit was verified—the complaint in this case was verified on the [282] 22d day of March, 1911. Now, up to that time, did you intend to build a wharf there? Did you have—up to that time, did you have any intention of building a wharf on this place?

A. Build a wharf if it was necessary—if necessary for what—well, I told you about in the general pursuit of my business, fish business, having a fish station or ground where I could moor my piles in case of a wind; moor my steamers and get my steamers to the wharf, and put my combustibles, as I told you before, if necessary.

Q. Well, didn't you know at that time whether it was necessary or not to do that?

A. Might be one year bring conditions, you can't calculate on another.

(Testimony of James T. Barron.)

Q. You mean if it was necessary to protect your property?

A. We are increasing our plant right along.

Q. That is what you mean?

A. Well, we need upland and more traps. It is necessary for us to have more traps.

Q. Would you build a fish-trap on this site if Alexander hadn't jumped in there and built one before?

Mr. WINN.—I think he has gone into that.

Mr. JENNINGS.—Never will get through. If you will just let him answer.

Q. If Mr. Alexander hadn't jumped in there and built a trap you would have?

A. I might have; yes.

Q. You would?

A. I may have; yes; I don't know what might have occurred before I got up there.

Q. That was your intention?

A. I let that location go for years and never put a fish-trap there. [283]

Q. You would put a fish-trap there?

A. I testified as one of the assets I thought that I would acquire if I got the upland and the privilege of building a fish-trap, I would.

Q. That is the things you got it for?

A. One of the things I got it for; yes; one of the things.

Q. And the other thing was to build a wharf?

A. Yes; build a wharf.

Q. And if you could, do both?

(Testimony of James T. Barron.)

A. Well, yes, sir; I didn't know the angle that fish-trap would occupy when I wired to Mr. Barker to build a wharf there. Of course, it is impossible to have a wharf and run a fish-trap at the present angle they have got for their lead.

Q. It is possible? A. It is impossible.

Q. (By the COURT.) It is impossible?

A. It is impossible to build a wharf with the angle the way the fish-trap is now and the angle the lead is on. It is impossible to have a wharf there at the present time, and have the fish-trap there, too.

Mr. JENNINGS.—That is all.

Mr. WINN.—Have you got any more, Mr. Cheney?

Q. (By Mr. JENNINGS.) Well, then, if you got this property, you would decide which to put there, a wharf or a fish-trap?

A. I would decide whatever my interest or whatever circumstances would be. I would do as I wanted.

Q. But at the present time you haven't decided whether you want a wharf or a fish-trap?

Mr. WINN.—He has answered that question a half dozen times.

COURT.—If he has, I haven't got his intention.

A. I told him I decided now to build a wharf; I have decided to [284] build a wharf there.

Mr. WINN.—Said a while ago he was going to build a wharf.

Q. (By Mr. JENNINGS.) If you get this property you are going to build a wharf?

A. I am going to build a wharf, yes.

(Testimony of James T. Barron.)

Mr. JENNINGS.—All right. That is all.

Mr. WINN.—That is all, Mr. Barron.

COURT.—That is all, Mr. Barron,

Mr. WINN.—Call Mr. Barker. [285]

[Testimony of Fred Barker, for Plaintiff.]

FRED BARKER, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Let's see—what are your initials, Mr. Barker? A. F.—Fred.

Q. Mr. Barker, I believe that it was you who verified this first complaint in this suit and came in here to see Mr. Burton about commencing the suit?

A. It was.

Q. You went over to see Mr. Cheney too about it, did you? A. I did.

Q. He told you he had been employed by Alexander? A. He did.

Q. Now, Mr. Barker, what—I believe the complaint is verified on the 22d, is it, of March?

Mr. JENNINGS.—22d.

Q. (By Mr. WINN.) 22d day of March. Where did you stay for a month or so prior to the 22d day of March?

A. We arrived here on the 8th day of that month.

Q. On the 8th day of March? A. Yes.

Q. How long have you been in the employ of the Thlinket Packing Company, the company of which Mr. Barron is president and, from what he says, the manager? A. This is the third year.

(Testimony of Fred Barker.)

Q. The third year. In what capacity have you been serving that company, Mr. Barker?

A. Superintendent.

Q. Superintendent. Your position—is it principally confined in and about the cannery, or is it outside, or both? [286]

A. I am in the cannery and I am also on the outside.

Q. Were you down at Seattle at the time that Mr. Barron closed the deal with Robertson to purchase this land embraced in survey 804? A. I was.

Q. Do you remember about what day it was of that year and the month that this deal was closed as between Mr. Barron and Robertson and when he had closed—I don't mean when the deed was made out—when the understanding was had between them that Barron was to purchase the site from Robertson?

A. On the first day of the month.

Q. First day of March, and you arrived here on the 8th? A. On the 8th.

Q. So, when was the first time you saw the deed to the property, Mr. Barker?

A. The deed from Victor Robertson?

Q. Yes, the deed from Victor Robertson. When did you get it up here from Mr. Barron, do you remember?

A. The deed was sent here to Mr. Burton, I think.

Q. You think it was sent here? A. I think so.

Q. To Mr. Burton, but the bargain for the purchase of the property was closed it seems between Robertson and Barron on the first of March before

(Testimony of Fred Barker.)

you left there? A. Yes.

Q. Now, that was the same deed, I think, that was offered in evidence on the hearing in this case to dissolve the preliminary injunction?

A. To the best of my knowledge it was.

Q. Now, do you know Alexander, the plaintiff?

A. Yes, sir. [287]

Q. The defendant in this case? A. Yes, sir.

Q. How long have you known him, Mr. Barker?

A. I think the first time that I met him to hold conversation with him was March the 14th.

Q. March the 14th. Where did you see him at that time, Mr. Barker?

A. On a pile-driver at this location.

Q. On a pile-driver at this location. You mean the location of the fish-trap?

A. Immediately opposite this survey 804.

Q. What was your occasion of being out there in front of this property at that time, Mr. Barker?

A. Mr. Alexander had been in Funter Bay with his pile-driver for a short time, we supposed seeking for an opportunity, favorable opportunity of driving there.

Q. Over there? A. Yes.

Q. And when did you first find that he had gone down there to drive this location?

A. We saw him pass the cannery with his driver in tow.

Q. Where was Barron then, Jim, was he in Alaska or down below? A. No; he was below.

Q. He was below. Well, now, you went over there

(Testimony of Fred Barker.)

then on or about the 14th of March, did you, to see what, if anything, Alexander was doing there?

A. I did.

Q. Did you see him there? A. Yes; I did.

Q. Who was with him?

A. With him, doing the work?

Q. Yes; was any one with him or was he alone?

A. Oh, no; he had a crew of men. [288]

Q. A crew of men, and what else?

A. And the pile-driver at work there.

Q. Had a pile-driver at work doing what, Mr. Barker?

A. Driving piles; driving piles there.

Q. Driving piles on what afterwards you ascertained to be a fish-trap he constructed?

A. The fish-trap; yes, sir.

Q. Did you have any conversation there with Alexander at that time? A. I did.

Q. What was the conversation you had with him—what was the conversation, that is substantially, Mr. Barker, you had with him?

A. He asked me at that particular time, pointing to those old location piles, this—asked me if they were Mr. Barron's piles. I said, "Yes, there was a notice nailed upon the piles." He said, "Well, I will respect that."

Q. Said he would respect the notice? A. Yes.

Q. Did you have any further conversation with him?

A. I told him that was one of Mr. Barron's locations and that we would proceed to protect it.

(Testimony of Fred Barker.)

Q. What did he say to that?

A. He expected to be enjoined, but he would thrash the matter out further in the court.

Q. How long did you stay there at that time, Mr. Barker?

A. Oh, probably a few minutes; may have been ten minutes, something like that.

Q. Now, this was on the 14th day of March?

A. 14th day of March.

Q. Had he driven any piles there before that?
[289]

A. Driven about six piles, I should judge.

Q. Had about six piles driven? A. Driven; yes.

Q. Do you know what date it was he left Funter Bay or passed Funter Bay with his piles going out there?

A. Going to this location, you mean?

Q. You said you saw him going past Funter Bay with his pile-driver?

A. Why, he probably did this work on that day; probably did this work on that same day; on the 14th.

Q. Was it on the 14th he passed by Funter Bay?

A. He passed out of Funter Bay; was in Funter Bay.

Q. Then, evidently had driven these piles on the 14th? A. That is what I mean.

Q. Well, did you serve any legal notice on him at that time? A. I did.

Q. Did he do any driving while you were there?

A. Yes.

Q. He didn't stop?

(Testimony of Fred Barker.)

A. Not at that particular time.

Q. And you stayed there about how long?

A. A short time.

Q. A short time? A. A short time.

Q. Did you go over on one of Barron's steamers?

A. No; I went over on a small gas boat.

Q. Went over on a small gas boat. Now, when you left you went back to the cannery? A. Yes.

Q. When were you out at that place after that, Mr. Barker? Well, I will withdraw that question—just withdraw that question, I will make it a little more chronological. [290] Then, you came back to the cannery. What next did you do in respect to this?

A. I came into Juneau; arrived the following day.

Q. That would be on the 15th?

A. On the 15th.

Q. And what did you do after you got into Juneau?

A. I cabled Mr. Barron to the effect that Alexander was driving at this particular place.

Q. Mr. Burton?

A. No; I cabled Mr. Barron.

Q. Where was he? A. At Portland.

Q. And then did you employ any one to commence a suit while you was in here?

A. Yes; Mr. Burton.

Q. And then the present suit was commenced?

A. Yes.

Q. And the hearing. Did you have authority from Mr. Barron to institute the suit? A. I did.

Q. Then, did you remain in town here until the

(Testimony of Fred Barker.)

hearing was had on the motion to dissolve the preliminary injunction, or did you go back to the cannery again?

A. I made several trips back and forth.

Q. Back and forth there. When was the hearing had the 28th, 28th or 29th?

Mr. CHENEY.—23d.

Mr. BURTON.—You mean the motion to dissolve.

Mr. CHENEY.—You got a continuance on the 26th.

Mr. WINN.—I don't care for that.

Q. Do you remember approximately what time you came in here to [291] be a witness on the hearing for the dissolution of the temporary restraining order. Do you remember approximately what day that was?

A. The 29th. I think, that was the 29th.

Q. The 29th. Did you go out to this fish-trap location or this little harbor in the meantime?

A. Several times.

Q. You had been out several times? A. Yes.

Q. And what was Alexander doing?

A. He had driven, I should say, as he himself testified—he said 50. I suppose there would be 43, about 43 piles driven in all up to the time of the hearing, March the 29th.

Q. You attended that hearing, did you, Mr. Barker? A. I did.

Q. Here is an exhibit, Mr. Barker, that was offered in evidence upon that hearing and marked Plaintiff's Exhibit "C" upon that hearing and it is marked

(Testimony of Fred Barker.)

Plaintiff's Exhibit "E" on this hearing. Do you remember having seen this exhibit upon the hearing for the dissolution of that temporary restraining order?

A. Yes.

Q. Now, and you had also been out to the ground where Alexander was driving and had seen what he had been doing?

A. I was present with Lloyd Hill directed—got his measurements and distances for making that plat.

Q. Oh, all right. Then, you—you went out to this place with Mr. Hill to get the data from which he made his exhibit, did you? A. I did.

Q. Did you help him make any soundings at that time?

A. I was present. I did not help him. I was present. [292]

Q. The measurement then you didn't know anything about?

A. I didn't make them myself. I was present.

Q. You didn't make them yourself but you identify the trap that had been put down there by Alexander and had it taken down according to representations made on this exhibit "E"? A. Yes; I do.

Q. Do you remember whether or not that at the time you and Hill were out there that Alexander had moved his pile-driver away and quit driving there on his trap?

A. Oh, no driver at that time; he had no driver at that time; the driver was taken away.

Q. Now, then, you attended that hearing upon the motion to dissolve the temporary restraining order and also testified on that case? A. Yes; I did.

(Testimony of Fred Barker.)

Q. And you was here and heard Mr. Alexander testify? A. I did.

Q. Now, what did Mr. Alexander state upon that hearing with reference to whether or not he had at that time completed his trap?

Mr. JENNINGS.—Object—incompetent, irrelevant and immaterial. Object as immaterial and irrelevant. This is a trial *de novo*. The question isn't what he said then or what he didn't state. The question is now have they got a right to a mandatory injunction, or whatever wants with it. I don't care what he testified to then or what the other things were then.

COURT.—I think it is myself, Judge Winn, unless it may become material as impeaching testimony after the defendant takes the stand if he does take the stand this time.

Mr. CHENEY.—Wouldn't be the best evidence any way. That case was reported—the evidence of it.

COURT.—I think any man who hears testimony in the court [293] room may testify.

Mr. WINN.—Well, are you through, Mr. Cheney? When you and Mr. Jennings get through I will try to say something.

Mr. CHENEY.—I wish to object for the same reason. What your Honor has heard in this former trial here, unless Mr. Alexander takes the stand, it doesn't become competent.

COURT.—That is my view of the matter.

(Testimony of Fred Barker.)

Mr. WINN.—It is for this purpose, if your Honor please, I think it is admissible for two purposes. In the first place, if it please the Court, we pleaded it in our amended or supplement pleading; they denied it; we say that Alexander came in here and testified at that time, if it please the Court, that he had completed his trap; upon that testimony there was a ruling made by this Court that disposed of that. A man who seeks the assistance of a court of equity must come in with clean hands. If it is true that this—

Mr. JENNINGS.—We will— ✓

Mr. WINN.—Let me get through. Now, then, if it please the Court, that is the issue we have made and they have seen fit to join issue with us on it. Now, then, it is admissible for the purpose of showing the good faith, if it please the Court, when I am dealing with this court if an injunction is dissolved it ought to be placed somewhere in the record, if it please your Honor, upon what grounds and upon what testimony that injunction was dissolved; otherwise, if the Court please, suppose they should rest their case and not put any evidence in this case. Now, it gets before the Appellate Court on either side. Now, the Court says: Well, the lower Court ruled at a former time on this matter and indicated that an injunction shouldn't have been granted or made; and can't present any new phase of the case on this final hearing. You see it comes back doubly against us in that respect, and [294] another proposition, if it please the Court, as I was about to say, this man is supposed to come into court with clean hands, and if he had structures there,

(Testimony of Fred Barker.)

then he swore in this court and testified over and over again that he had completed that trap and didn't want anything else except what he had at that time. Now, notwithstanding the fact your Honor, but he goes ahead and violates his oath, and I say if the evidence as reported by the stenographer in this case is true, if Alexander swore to that which—I can prove—then Alexander is guilty of perjury, the rankest sort of perjury in this case and should be prosecuted for it. Now, if that is true in this connection, if it please your Honor, should that matter not come out? Now, it is true they can fail to put Alexander on the witness-stand, then I am left here to show that your Honor's ruling made before was not made on the—what is present at this time, new and different structures entirely; and if it please the Court, that he swore over and over again, if your Honor remembers, that insomuch as he wasn't going to put another line on there, we could go around there, and he extended it 200 feet. Now, that is going into the good faith. It is part of our allegation in this complaint and it is denied by them. Another thing it is permitted for us to substantiate the thing this witness is testifying to; that he went out there at that time and saw the structure as it was constructed and that he says the pile-driver was gone. Alexander comes in and testifies himself. Now, these admissions, if your Honor please, he noticed how the piling and how he had the fish-trap this witness could tell whether he had finished the trap,—now, that would come in having his admission and another purpose; and being part of

(Testimony of Fred Barker.)

our complaint, I don't think should be deprived of our proof before [295] the Court because, as you see, it rests with them, if they put Alexander on the stand. If can't put him on the witness-stand I can't try to impeach him, but I say aside from that impeachment, I think it is part of our case.

COURT.—No; I hardly think so, Judge. Now, let us see what the fact is. You are asking for a mandatory injunction. It doesn't make any difference what the Court based its ruling on before or whether the Court was wrong or right. You have to show a case now that will authorize this Court to grant you this relief. Now, what the defendant may have said cannot affect the question as to whether or not you need to have a right of way. When he takes the stand himself, then if he gives testimony which is in conflict with testimony that he gave last year, then it is competent for the purpose of impeachment, but it wouldn't make any difference what he testifies to; wouldn't make any difference how erroneous the ruling of the Court may be or what it might be based on if you don't make a case here, this Court can't give you relief whether the defendant swore truthfully or falsely on the last occasion; that would be immaterial.

Mr. BURTON.—Just one point, if the Court please, that I have in this matter.

Mr. WINN.—Part of our supplemental pleadings.

Mr. BURTON.—At the time we filed the complaint in the preliminary hearing, as I take it this matter is a proceeding which relates back to the commission of the act, that is, relates back to the bringing of the origi-

(Testimony of Fred Barker.)

nal complaint. Now, then, if the Court please, things have happened since the preliminary hearing which is set up in our supplemental complaint. An issue is made upon that allegation in the supplemental complaint. Now, I take it, if the Court please, that [296] these matters showing the changes in conditions from the time of the preliminary hearing to this time is certainly admissible just the same as any new conditions in any other suit where you are permitted under the code. You see now it isn't for the purpose of impeaching Alexander's testimony. It is for the purpose of showing the changed conditions from the time of the preliminary hearing in a court of equity up to this time. Now, I take it that a court of equity certainly has a right to go back and ascertain just what were the conditions at the time of the preliminary hearing and permit the testimony of things that have been changed.

COURT.—Mr. Burton, I haven't ruled you shouldn't show all the change of circumstances. I say you may by this witness or any other witness, but as to what the defendant said he was going to do is certainly not material at this time unless you may later seek to impeach him on it; but as to what he said he was going to do as to what he may have promised in court he would do, that doesn't and could not affect the physical features. No, gentlemen, let's not take up any time arguing that.

Mr. BURTON.—Wouldn't the question be proper, if the Court please, just for information, would the question be proper to this witness at the time of the

(Testimony of Fred Barker.)

preliminary hearing that he understood from the testimony of Alexander that the trap was completed except eight piles; not for the purpose of impeaching Alexander but for the purpose of showing conditions upon the ground at that time.

COURT.—It couldn't change the situation. This witness or any other witness can describe just what exists and what changes have taken place since. If you seek to show that now, why the Court should rule differently from what it did [297] before, that is competent, but when the Court comes to rule on this case to find out whether you make a case, of your own or not, well, as to what the defendant said on a former trial is absolutely immaterial. In your case in chief you have to make a case which will authorize this Court in granting the injunction to remove the structures from in front of you, and false promises on his part cannot affect your right in any way. When the time comes if it becomes material, I will give you plenty of time to prove that.

Mr. WINN.—Then, in order to get the record clear, if your Honor please, I now offer to prove on this feature of the case in support of our supplemental pleading in this cause and for other purposes that the defendant Alexander, in the presence of the witness who is now upon the witness-stand, testified upon the motion to dissolve the temporary restraining order that his trap was then complete with the exception of eight piles to then be driven by or to be driven in and about the pot and filler (spiller) and would not extend the lead any farther out or to get any

(Testimony of Fred Barker.)

nearer the shore line.

COURT.—You object to it.

Mr. CHENEY.—We object to it, if the Court please, on the ground that it is immaterial.

COURT.—The offer may be overruled in the view the Court takes of the question it is immaterial at this time what may have been testified to; cannot become material unless he takes the stand as a witness and then it may become material for the purposes of impeachment, but not in the plaintiff's case in chief.

Mr. WINN.—Then, I would offer for this one further purpose, your Honor, to show an admission on the part of the [298] defendant that the fish-trap at the time the witness is testifying concerning was in the same condition as the witness is going to testify that it was in case that the admission that the defendant made in court was admitted, which corroborates the testimony of this witness who is now on the stand, to show the truthfulness of the testimony that the witness is going to testify to.

COURT.—May be something in that.

Mr. CHENEY.—I don't quite understand that—to show the truthfulness of this witness.

COURT.—He is seeking to prove an admission made by the defendant which will corroborate this witness. I understand that is it?

Mr. WINN.—Yes, sir.

COURT.—I think that may be received. You object to it.

Mr. CHENEY.—Object to it, if the Court please. I, of course, haven't said anything in regard to this

(Testimony of Fred Barker.)

matter, but it seems to me that Judge Winn is getting a lot of stuff in this record entirely tending to prejudice Mr. Alexander in this case. Now, certainly Judge Winn can't contend there was any strings on that decision made by your Honor last year. He wasn't trying to mislead this court.

COURT.—Now, so far as prejudicing anybody, this Court is going to hear everybody and anybody.

Mr. CHENEY.—I didn't mean in this court. With all this stuff Judge Winn has stated about violating his promise—Mr. Alexander made no promise. We haven't asked to do this.

COURT.—That is Judge Winn's version. If it becomes material you can show your version of it.

Q. (By Mr. WINN.) Now, then, Mr. Barker, did you hear Mr. Alexander state when he was in court upon that preliminary hearing that the trap, as you have just described it and as you have indicated that it is on Plaintiff's Exhibit "E," was in [299] the condition at that time that you have described it was in and, if not, what exception or what explanation can you give in regard to it?

A. This is the condition that the trap was in at the date of the hearing, March 29th.

Q. And did you hear Alexander admit on the trial of that case that was the condition the trap was in?

Mr. CHENEY.—Object to that as leading, your Honor.

Q. (By Mr. WINN.) Well, did he testify to that in court?

COURT.—He may answer if he knows.

(Testimony of Fred Barker.)

A. He testified to that certainly.

Q. (By Mr. WINN.) Now, then, do you remember further, Mr. Barker, that Alexander further testified that there were to be eight more piles put in at the trap. He testified to that on the other trial?

Mr. CHENEY.—Object to that.

Mr. WINN.—I am just going to follow it up by showing that he went out and saw the trap lead.

COURT.—He may answer.

A. He testified that he would drive no more piles inshore from the direction of the lead as it was, and stated in cross-examination by his Honor, Judge Lyons, who presided there, a similar one, and he was asked the question by the Court as to whether or not the “Anna Barron” could go around there and then the Court stated that the defendant stated that the trap was complete.

Q. (By Mr. CHENEY.) That is your recollection? A. That is my recollection.

Q. (By Mr. WINN.) That is your recollection of his admission?

A. That is my recollection of his admission the second time.

Q. Well, now did he put any more piles—I will ask you this question: Did you hear him state on that hearing he expected to put eight more piles in the heart or filler (spiller)?

A. Eight more piles, but no more in the direction of the shore. [300]

Q. Now, I will ask you if you saw the trap again after he put those eight piles in? A. I did.

(Testimony of Fred Barker.)

Q. What time did you see it then, Mr. Barker?

A. March the 10th; I saw it for the first time April 7, 1911.

Q. Well, can you explain to the Court now about where he put those eight piles in, those additional eight piles, just approximately, those additional eight piles?

Mr. CHENEY.—Well, if the Court please, I object to that because this witness could not by any possibility know where Mr. Alexander drove those piles. He wasn't there and no possibility of knowing where he drove them.

COURT.—That is for him to say.

Mr. WINN.—You are not testifying; the witness is.

A. Counted it there; fifteen more piles driven in on that lead toward the shore.

Mr. CHENEY.—That wasn't the question and I object to it and ask that it be stricken out. He asked where those eight piles were driven—you know the eight piles?

A. I could not answer the question as to the eight piles.

Q. (By Mr. WINN.) I asked you if you had visited the trap after he put the eight piles in that he testified upon that hearing that he was going to put in? Did you see the trap?

A. I visited the trap April 7, 1911.

Q. Well, now, did you see any change in the condition of the trap in April when you visited it from its condition that you saw it in just prior to the hear-

(Testimony of Fred Barker.)

ing on the preliminary motion to dissolve—on the motion to dissolve the preliminary injunction?

A. I did. There were nearly eighty piles in the trap April 7th. The trap was then about completed.
[301]

Q. Oh, I see. Now, then, when you went out in April then instead of seeing eight more piles in there, how many more piles did you see in the trap?

A. Well, I saw about eighty; eighty, all together.

Q. Eighty, all together?

A. Eighty, all together.

Q. That would be about forty-two or three, thirty-nine or forty in addition to what you saw before?

A. That would be about thirty-seven possibly.

Q. Well, now, when you went there in April what change in conditions particularly was there in that trap from what it was at the time of the hearing on the preliminary—on the motion to dissolve the preliminary injunction?

A. It was 260 feet longer in towards shore and the bulk of it was completed with a pot in the center and a spiller on either side. It was 130 feet in width—the front width.

Q. Now, was that extra lead put on there before the preliminary—before the hearing was had to dissolve that preliminary injunction or afterwards?

A. Afterwards.

Q. Now, I don't know, Mr. Barker, was he fishing the trap when you was out there in April? Was he fishing the trap? A. Not in April.

Q. Didn't have his web strung? A. No.

(Testimony of Fred Barker.)

Q. Didn't have his web strung? A. No.

Q. Now, did you go out there with Mr. Hill here on the 11th of this month when he went out there to put on these additional piles? A. I did. [302]

Q. You went out there? A. I did.

Q. How did you find the fish-trap there when—I refer to the fish-trap, I mean, of course, the lead and everything that goes with it to make the trap—with respect to the condition it was in when you was there in April?

A. It was in approximately the same condition. There was very few piling out.

Q. Been very little change made in the condition over the winter. Very well. I will ask you if you heard Mr.—don't answer this question until the Court rules upon it. Maybe it may come under the head, your Honor—so with—did you hear the witness Alexander testify on the occasion of the motion to dissolve the temporary restraining order and did he testify substantially that the reason that that wouldn't block Barron's way to the upland was because that he wouldn't extend his lead any farther than the bunch of piles that is marked on exhibit "D," than the little cluster of piles that is indicated "Barron's piles"?

Mr. JENNINGS.—We object to that, if the Court please, for the same reason; incompetent, immaterial and not the best evidence.

COURT.—I think that is true. I think the objection should be sustained.

Mr. WINN.—All right. If your Honor please,

(Testimony of Fred Barker.)

I will take an exception. I will make a brief offer. We offer now to show by the witness that Alexander testified upon the hearing at that time and gave his reasons for testifying to it was that his trap, as then constructed, it did not block the way of Barron to his property or ingress or egress from that property to deep water for the reason that he had left a distance of some three or four hundred feet from his lead to [303] the line of ordinary high tide in which boats could pass in and around his trap and get to the upland without in any ways interfering with the trap or the trap interfering with such ingress or egress and that he did not intend to extend it any farther than it was then.

COURT.—Any objection.

Mr. CHENEY.—Object for the same reason. I suppose he is just stating what he intends the offer—he asked the same question.

Mr. WINN.—No; I say I offer to prove this.

Mr. CHENEY.—You asked the question from the witness now. You made the offer of the same thing before?

Mr. WINN.—Yes; certainly.

Mr. CHENEY.—I object for the same reason: immaterial and not the best evidence.

COURT.—Yes; the objection may be sustained. The question in this case is not what the opinion of the defendant was at any time. The question here is, Is the right of access interfered with?

Mr. WINN.—I will take an exception, your Honor, to the ruling.

(Testimony of Fred Barker.)

COURT.—Yes, sir.

Q. (By Mr. WINN.) I don't know, Mr. Barker, did you help Mr. Hill make any of his measurements when he was out there on the 11th of March?

A. Yes.

Q. Well, I wish you would state—

A. Only some of them; only some of them.

Q. Just state to the Court, referring to this exhibit "D," what measurements you helped him to make and we will get over that quickly?

A. In the distance of the line as extended—between the condition [204] of the trap March the 29th and—

Q. How it was on March 11th of this year?

A. March 11th of this year.

Q. And what did you find that distance?

A. 261 feet.

Q. Yes; I know, but how is it represented on there, by a yellow line or dots?

A. By piling that were driven.

Q. Well, between what points?

A. Between east of the scattered piles.

Q. Well, give us the letters, Mr. Barker. You can see better than I can.

A. It is as dark for me as it is for you.

Q. Is it. Excuse me. I can't look down. My glasses are not very good to read with.

A. Between these Barron piles on the plat as marked "Barron's piles" and "Alexander's lead shore pile Mar. 11th, 1912."

Q. And what distance did you find that?

(Testimony of Fred Barker.)

A. 261 feet.

Q. Now, did you help Mr. Hill make any other measurements there?

A. I was present in the boat when he made the soundings.

Q. Oh, you were? A. Yes; along the lead.

Q. Along the lead? A. Along the lead.

Q. Along the lead that has been extended?

A. Been extended towards the shore.

Q. Do you—do you remember what those were?

Mr. CHENEY:—Suppose he can read them from the map.

A. Yes; I can read them from the map; various distances; varies from 18 feet to the last pile inshore a depth of 8 feet.

Q. (By Mr. WINN.) Was that correctly measured? [305] A. It was a correct measurement.

Q. And it was as you say there indicated on this map? A. It is.

Q. Now, did you help him make any other measurements? A. I did not.

Q. That was the only measurements you helped him make? This sounding that he did in a small boat and which is indicated at various places on this exhibit you did not help to make that?

A. I was present in the boat. I did not help to make it.

Q. Oh, who was helping him to make it?

A. Captain Mason and the deck-hand was in the boat—two of the men from the crew at the cannery.

Q. Now, Mr. Barker, I believe you were questioned

(Testimony of Fred Barker.)

to some extent in this case on the motion to dissolve the preliminary order as to the condition of this beach in front of the Barron's piece of property?

A. Yes.

Q. Well, now, I wish you would describe that to the Court again, as your evidence in that case is not in this case.

A. It is simply high bluffs that extend as marked on the plat from corner No. 3—that should be corner No. 2, should it not?

Q. Yes; I think so.

A. That should be corner No. 2. These high bluffs extend east of it.

Q. Yes. A. And then immediately it is—

Q. Well, now wait. What commences at corner No. 2 and extends easterly along it for some distance, how is that?

A. That is comparatively level beach without bluffs on that [306] side of the survey.

Q. Yes. Now, what would be the most practicable and best place to wharf out there, Mr. Barker?

Mr. CHENEY.—We object. He is not qualified.

Q. (By Mr. WINN.) If a wharf should be built?

COURT.—He may answer if he knows.

A. I answered before. To intercept with that trap.

Q. (By Mr. WINN.) And it would be built out from which part of the shore line, considering this corner No. 1 and this corner No. 3, along what part of that shore line would you say is the most accessible way to reach deep water from this piece of ground?

(Testimony of Fred Barker.)

A. Why, you would have—this is the beach that we claim and you would intersect the trap with whatever line of wharf we drove there, because we cannot drive piles any other place.

Q. Now, here are two words “mean” and “high” on, or three words “tide,” now in referring to those three words on the shore line there where would you say was the best and most successful way of getting out from that piece of property?

A. As I testified before in the last hearing, I testified immediately in front; we want to make our line immediately in front of that cabin on account of the formation of the beach there.

Mr. WINN.—You may cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Barker, you say that in your opinion this would be the best place immediately in front of this cabin to build a wharf over this piece of tide land out so it would intersect the trap?

A. I say we want to reach that part of the beach.
[307]

Q. He asked you—I understood you to say that you thought that was the best place to build a wharf, that was what Judge Winn asked you. Do you want to say that now?

A. I say we want to reach that portion with a wharf; that portion of the beach; this portion, as I testified before.

Q. Oh, I understand. You don't intend to give any opinion then, Mr. Barker, as to whether this

(Testimony of Fred Barker.)

would be the best part of the claim to build a wharf from here on this west end, what you call the sandy beach, or whether it would be better over here on the east end? You don't want to give any opinion on it?

A. I give the opinion: this is the portion of the beach we want to reach.

COURT.—The question is which would be the best place to build it; not where you want to build it.

A. I have answered. I don't want to change my testimony.

COURT.—Well, now answer this.

Q. Now, Mr. Barker, whether or not you mean that is the best place to build from or whether it is the place you want to build from. The question is not where you want to build from, but where the best place is? You can answer that.

A. I have answered to the best of my ability, Judge.

Q. I understood you answered when Judge Winn asked you what you would consider the best place to build here, you said directly in front of the cabin. Now, I thought you meant to convey the impression that you thought that was the best driving ground and the best place to build a wharf from out into the deep water. You don't—don't mean that, or do you mean that is the place you want to drive?

A. I don't know as I am fully competent to tell the best piece of ground on that beach. [308]

Q. (By Mr. CHENEY.) Then, you wouldn't want to offer an opinion on that point?

A. I cannot.

Q. You wouldn't want to say up on this east end

(Testimony of Fred Barker.)

was the best place to build a wharf?

A. No; I wouldn't say the east end for the simple reason the bluffs are there.

Q. You do want to give an opinion?

A. I am talking of the point on the beach we want to reach.

Q. I understand, but you have stated—I asked you if you wanted to give an opinion. You said you weren't competent. Then, I asked you if this isn't as good, if not better, over on the east end and you said it is?

A. I say to that as I have at first that the point on the beach we want to reach is immediately in front of the cabin.

Q. That is the point on the beach you want to reach is in front of the cabin? A. Oh, yes.

Q. But you say you are not competent to testify whether this is the best place to build a wharf, best driving ground, or whether this end is the best?

A. I am not competent to say which is the best place to drive piles on that beach. I cannot say.

Q. You don't know but what this place you say you want to reach here is in fact the worst place on the whole survey to build a wharf?

A. I won't say that; I won't say.

Q. You know there is deeper water over on the east end. You do know that much about it?

A. I know there is deeper water over here.

Q. We are not talking about away down here. Don't you know as a matter of fact that the water gets deeper over to the east [309] end of the claim?

(Testimony of Fred Barker.)

A. I wasn't present when any soundings were made here.

Q. You were present with Mr. Hill out here?

A. No.

Q. Well, we will say along the lead line?

A. Yes.

Q. But you never sounded out here toward the east end of the claim? A. No.

Q. No. You didn't sound out here?

A. No. I wasn't present.

Q. Now, Mr. Barker, let me ask you this: When you went down there on the 14th of March to see what Mr. Alexander was doing, you didn't say anything to him about this survey 804-B, did you, about what—I say, when you went down there to see Alexander about, when driving his trap, starting in to drive it, you didn't say anything about Mr. Barron's owning this survey? A. No; I did not.

Q. And you didn't say anything to him about building a wharf out there, did you? A. I did not.

Q. All you told him was that—that the company was going to build a fish-trap there, didn't you, and that they were going to drive all their traps this season?

A. I served the notice, which notice is on record.

Q. I asked you what you told him. Did you tell him anything? A. Yes; told him so many matters.

Q. You told him that?

A. I told him we should protect our location.

Q. What kind of location? [310]

A. Trap location.

(Testimony of Fred Barker.)

Q. Trap location. And you did tell him that the company or Mr. Barron, I don't know which one you used, either the company or Mr. Barron, intended to drive all their trap locations this season?

A. I think the notice states that.

Q. The notice you served on him says that?

A. I think it does.

Q. That notice you served on him stated that the company intended to drive all their traps then?

A. The notice is of record. I won't state now word for word what it does contain.

Q. Well, you told him by word of mouth, that is, you told him orally, that the company intended to build a trap there, didn't you?

A. I think the notice—

Q. I am not asking about the notice now.

A. I don't know as I did. I don't know, Mr. Cheney, as I can not remember that. I distinctly remember giving Mr. Alexander that notice.

Q. Did you go up to Mr. Alexander like a deaf and dumb man would? A. No; I did not.

Q. Couldn't speak or hear anything and simply handed out the notice and go back?

A. No; I stayed down; talked about many matters.

Q. What did you talk about?

A. About his making a trap there.

Q. What did you tell him about the trap there?

A. I asked Mr. Alexander: "What are you going to do?" and he said: "If you leave me alone, I won't bother you at any [311] other place." The principal topic.

(Testimony of Fred Barker.)

Q. That is all the conversation you had?

A. Well, there was a great deal of it. That if you leave me alone here at that particular place, I won't bother you at any other place.

Q. I will ask you if at the last hearing you told him that the company or Mr. Barron were going to drive all the traps?

A. I think my notice was sufficient.

Q. I haven't asked you about that yet. I am asking you what you said to him orally. I don't care what you said to him by the notice. I am asking you what you said in the notice?

A. The notice is of record. I cannot remember the exact words that was in it.

COURT.—If he can't remember.

Mr. CHENEY.—I think that is the answer there.

Mr. WINN.—Wait a minute.

Mr. CHENEY.—He wants to complete his answer.

Mr. WINN.—Just wait a minute.

Mr. CHENEY.—Nothing before the Court.

Mr. WINN.—That notice is here. Now, when the witness says he don't remember anything else, I don't think should be prejudiced by not having the notice.

COURT.—I think that is a complete answer.

Mr. CHENEY.—Yes, but just as Judge Winn objected Mr. Barker was completing the answer there. He said that was the sense of it.

WITNESS.—May I answer this—explain?

COURT.—Certainly.

A. My impression was this: that I did not know

(Testimony of Fred Barker.)

what was going to take place in view of the right of Mr. Barron's location to this cove and the defendant was here on the ground. Now, [312] it is up to me to find out whether he is going any where else. I gave him the notice regarding that and then we had a conversation, just a free conversation, as it was. I didn't know who Mr. Alexander was. He didn't know me. We talked together and then I asked him the question, as I said before: "What are you going to do, Mr. Alexander, and where are you going next?" and he said, "I won't bother you any more if you leave me." Now, that is the part that is very fresh in my mind. I remember distinctly handing him the notice, because the notice was addressed to the Tee Harbor Packing Company, because the Tee Harbor Packing Company was the owner of the outfit, as I supposed.

Q. (By Mr. CHENEY.) Well, then, when you say that was the sense of it, what do you mean by that?

Mr. WINN.—I object to that.

COURT.—Have you the notice here?

Mr. CHENEY.—I am not talking about the notice.

WITNESS.—I would like to see the notice.

Q. (By Mr. CHENEY.) As to whether or not you answered that is the sense of it, that is Mr. Barron or the company was going to drive that trap location—what do you mean by that?

Mr. WINN.—He is going ahead and repeating a long conversation. Now, your Honor, I submit—

(Testimony of Fred Barker.)

Mr. CHENEY.—I am examining the witness.

COURT.—Just a moment, gentlemen. If you want to examine him about the condition of the paper, I think it ought to be submitted to him. If you want to ask him about anything he answered, that is another question, and I understood the witness to say he didn't remember.

Q. (By Mr. CHENEY.) Just ask you to answer the questions and not be talking about this notice all the time. What did you tell Mr. Alexander, if anything, in regard to the intention [313] of Mr. Barron to drive a trap on that location where you found Mr. Alexander with the pile-driver? What did you say, if you said anything?

Q. I have repeated all the conversation—I remember the greater part of it, and the notice was plain and legible. I handed Mr. Alexander that notice.

Q. Gave—just a moment—do you remember you told Alexander on that occasion Barron was going to put a trap there or not? A. I do not.

Q. Can't answer then. I understood you to say, Mr. Barker, that you are not competent to testify about the place of building a wharf? You don't want to offer an opinion on it—the best place to build a wharf there?

A. I don't want to offer the opinion as to which is the best driving ground on that beach.

Mr. CHENEY.—I think that is all, unless Mr. Jennings has some questions.

Mr. JENNINGS.—Just one or two questions.

Q. How long did you say you had been connected

(Testimony of Fred Barker.)

with the Thlinket Packing Company—how long have you been—how long had you been connected with the Thlinket Packing Company up to the time of the bringing of this suit?

A. This is the third season.

Q. This is the third season. And you was superintendent of the cannery at Funter Bay? A. I am.

Q. You were familiar with the plants of the Thlinket Packing Company, weren't you?

A. Not all of them; no.

Q. Well, Mr. Barron had talked to you about the trap sites? A. Somewhat.

Q. He had told you what he intended to do with them and whether [314] he intended to build, didn't he? A. Somewhat; has stated somewhat.

Q. And he told you whether he intended to build on this trap site? A. No; he did not.

Mr. WINN.—I object to it, if your Honor please, it is not proper. I don't think it is proper cross-examination. I never asked him about any conversation with Mr. Barron. I never asked him about the intention of the company. I simply asked him what he saw out there at the trap location and the conversation he had with Alexander and about Barron's buying the piece of property. Now, I don't believe that is proper cross-examination.

Mr. JENNINGS.—All right, I withdraw the question.

Q. You did say that you went down there, you saw some old location piles and was a notice on the piles, didn't you? A. I did.

(Testimony of Fred Barker.)

Q. What did the notice say?

A. The name of J. T. Barron on the notice, 1910; I think J. T. Barron was on the notice; I am sure of that.

Q. Well, what else?

A. I think it was the figures the year 1910.

Q. Well, that wasn't all. There was on the notice, "I hereby claim this as a fish-trap site"?

A. That I could not say.

Q. What did it say about a fish-trap site?

A. Didn't say a word about a fish-trap site.

Q. Didn't mention fish-trap site?

A. Didn't mention fish-trap site.

Q. Just three piles were there?

A. The name of J. T. Barron, no, there were three piles, I think, out there in the water. [315]

Q. Just the name of J. T. Barron and the date on it? A. That was all.

Q. Was the piles all together, like a dolphin, or were they spread out in a row?

A. They were scattered.

Q. Scattered in a row. In a row were they?

A. Probably no regularity.

Q. And this notice was on one of these piles?

A. Originally two notices.

Q. Two notices. Each one of them on a pile?

A. On different piles.

Q. Just said J. T. Barron and the date?

A. And the date; yes.

Q. Was it J. T. Barron or the Thlinket Packing Company? A. J. T. Barron.

(Testimony of P. H. Mason.)

Mr. JENNINGS.—That is all.

COURT.—Anything further with this witness, gentlemen?

Mr. WINN.—No, sir; that is all.

(Whereupon Court adjourned until ten o'clock A. M., March 19, 1912.) [316]

Ten o'clock A. M., March 19, 1912.

COURT.—Proceed with the trial, gentlemen.

[Testimony of P. H. Mason, for Plaintiff.]

P. H. MASON, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Captain, give your name to the Reporter, will you? A. P. H. Mason.

Q. What is your business, Captain?

A. Master mariner.

Q. Have you followed the sea most of your life, Captain, in one capacity or another?

A. Yes, sir.

Q. You know Mr. Barron, do you? A. Yes, sir.

Q. And you are acquainted with the waters of Alaska? A. Yes, sir.

Q. Pretty well, are you not? A. Yes, sir.

Q. What experience have you had in navigating in the waters in Alaska—just previous to that, Captain, will you—the idea is I mean in addition to this you have had in your connection with the position you now have?

A. Well, I have been running up on the inside passage for the last twenty-five years, master of a vessel.

(Testimony of P. H. Mason.)

Q. And in the waters of Southeastern Alaska?

A. Southeastern Alaska.

Q. Yes, sir. You have been all over the waters of southeastern Alaska. You know where—you know where Funder Bay [317] and the Funder Bay cannery, of which the Thlinket Packing Company is the owner, are, don't you? A. Yes, sir.

Q. The cannery of which Mr. Barron is manager and the president of, the Thlinket— A. Yes, sir.

Q. — Packing Company. What are you following now, Captain?

A. I am master of the "Anna Barron."

Q. Master of the "Anna Barron." What is the "Anna Barron"? A. She is a steamer.

Q. And what is she doing? A. Towing.

Q. What business engaged in?

A. Fish business, towing trap piles, lighters, anything comes to hand.

Q. Is she one of the cannery tenders of the Thlinket Packing Company, the company of which Mr. Barron is manager and president? A. Yes, sir.

Q. How long have you been on the "Anna Barron," Captain? A. This is my third season.

Q. Third season? A. Yes.

Q. You have been master of her three seasons?

A. This will be. I have been master of her two seasons. This will make the third season.

Q. This will make the third season. Just tell the Court what business the "Anna Barron" has been engaged in generally since you have been master of her.

(Testimony of P. H. Mason.)

A. Towing fish, towing lighters, towing pile-driver and towing piles. [318]

Q. Then she has been, as I understand, in the general towing business for this cannery at Funter Bay?

A. Yes, sir.

Q. For which Mr. Barron is manager and president. You don't carry any fish on board of her at all? She isn't used for that purpose? A. No, sir.

Q. When you say towing lighters, what do you mean Captain?

A. Towing fish scows, fish lighters.

Q. Towing both empty and filled? A. Yes, sir.

Q. And you said something about towing logs or piles? A. Towing piles.

Q. Towing piles? A. Yes, sir.

Q. What do you tow piles for and what have you been towing piles for this past three years?

A. For trap piles.

Q. For the Funter Bay cannery? A. Yes, sir.

Q. Just put this remark in there, Mr. Reporter, and it will save some of my questions: When I refer to the Funter Bay cannery I refer to the cannery of which Mr. Barron is the president and manager, the cannery being owned by the Thlinket Packing Company. Now, Captain, during these three years have you become fairly well acquainted with the waters for some miles in and about Funter Bay?

A. Yes, sir.

Q. Now, Captain, I refer you to Plaintiff's Exhibit "B" in this case and I wish you would go over to this exhibit and take [319] this ruler and point out to

(Testimony of P. H. Mason.)

the Court the route that you take in towing piles each season for this—this canning company at Funter Bay.

Mr. JENNINGS.—We object to this line of testimony as irrelevant and immaterial.

COURT.—He may answer. Objection overruled.

A. Well, that depends where we are towing from.

Q. (By Mr. WINN.) Well, where have you been, in reference to Funter Bay, now where have you been towing the piles, north or south, east or west?

A. From the south.

Q. From the south? A. Yes.

Q. Well, you said a while ago that it depended upon where you were towing from—for how many places south of Funter Bay has your towing been confined to? A. Kelp Bay and Peril Straits.

Q. Well, now, in leaving Funter Bay, what body of water do you go down first as you leave Funter Bay?

A. Come out of Funter Bay and come right straight down in a southeast direction.

Q. In Chatham Straits?

A. In Chatham Straits.

Q. Yes. Toward where the fishing ground of—I withdraw that question, Mr. Stenographer—you know where this survey 804 of Mr. Barron's is, do you not, Captain? A. Yes, sir.

Q. With reference to that survey, about how far off the shore is your usual passage in going to and from the cannery with your tows of piles?

A. About—usually about half a mile. [320]

Q. Yes. Now, have you passed up and down this

(Testimony of P. H. Mason.)

shore alongside of the survey off and on for these past three years? A. Yes, sir; a number of times.

Q. Now, I wish you would just describe the land and ground as it is out in front of this survey 804, whether or not there is a cove or a little harbor. Describe it to the Court in your own way, Captain.

A. Well, this cove in here for northerly winds and northwest winds is a very good harbor; coming to the northward it is an excellent harbor.

Q. Well, it is—where is that with reference to this survey 804? A. That is right in front.

Q. Right in front of it?

A. Yes, sir; of the survey.

Q. I will ask you, Captain, if in going back and forth there for the last three years you have taken notice of this place going up and down, that is, this little cove that is in front of the land or survey 804?

A. Yes, sir.

Q. Now, I will ask you if during that time you have had occasion to be in there for any purpose?

A. I have been in there twice for a harbor towing piles from Kelp Bay.

Q. (By the COURT.) From what bay, Captain?

A. Kelp Bay.

Q. (By Mr. WINN.) Kelp Bay is on to the southward of Funter Bay cannery?

A. About fifty or sixty miles from the cannery; about sixty-five miles from Funter Bay.

Q. Well, why didn't you stop in Hawk Inlet when you was seeking [321] shelter?

A. This is more accessible and I would be that much nearer to the cannery. This is perfect safety.

(Testimony of P. H. Mason.)

Q. Now, I will ask you, Captain, if you, when there is a northerly wind blowing, whether or not—I will withdraw that question—when there is a northerly wind and you are going down Chatham Straits from Funter Bay on this route for piles, I will ask you if you have observed whether there is any check in the velocity of the wind here along this coast, when there is a stiff northerly wind blowing; that is, is it blowing the same up and down the coast of Admiralty Island on the side on which this survey is on or is there a difference in the case of a northerly wind? A. No, sir; it is different.

Q. Well, explain to the Court where it is different and what makes the difference.

A. Well, the tendency of the land, I think, has—makes one of the things; and the moment you get within a half a mile of this bluff the wind ceases, that is, speaking with a strong wind and when you get opposite this bluff in here, practically speaking, there is no wind to speak of at all.

Q. What is your usual route for your towing of piles when you are leaving Funter Bay as you come down the coast of Admiralty Island towards this survey? About how far do you usually go down there before you turn off in one direction or the other; that is, do you go on down the coast as far as Hawk Inlet? A. Oh, no, sir.

Q. When towing piles before turning off to that other ground? A. Towing from Funter Bay?

Q. Towing to Funter Bay. [322]

A. Towing to Funter Bay?

(Testimony of P. H. Mason.)

Q. Yes; towing to Funter Bay.

A. Well, I have an idea of my own. I come up along Chicagoff Island until I get pretty near to Cape Augustine, then I strike right across and try to avoid Cape Marsden.

Q. Where is Cape Marsden?

A. Cape Marsden is further down on this same Admiralty Island.

Q. Is it down south of Hawk Inlet?

A. Yes, sir; and—

Q. I see.

A. —and then I come up straight; avoid Hawk Inlet and come in this bay here. If the wind is to the north, if, practically speaking, little wind, little sea, we can come up until I happen to come out here.

Q. Until you happen to come out here—come until you happen to come out where this survey is?

A. Yes.

Q. And from there south with a northerly wind it is somewhat sheltered by this formation of the island there? A. It is.

Q. Yes, sir. Now, Captain, you can sit down. I believe that is all at present on that score. Captain, have you been into this little harbor, as you call it, in front of this survey 804 since Alexander built his trap there? A. Yes, sir.

Q. Was a trap built there when you went in with these tows of logs? A. No, sir.

Q. When did you first see this structure that Alexander has erected out in front of this survey 804? A. That was in March, 1911. [323]

(Testimony of P. H. Mason.)

Q. March, 1911. What time, Captain?

A. The latter part of March, the 28th or 29th.

Q. What was the occasion of your trip out there, then?

A. Well, to make a—to take a general survey of the place and see the situation there—what Mr. Alexander was doing.

Q. Who accompanied you on that trip, Captain. Who was with you on the boat, do you remember? Was Mr. Barron, Mr. Hill or Mr. Dudley and Mr. Barker?

A. No, sir; I think Mr. Barker was, but not Mr. Hill. Mr. Barron wasn't there.

Q. You was out there on one of the trips Mr. Barker speaks of? A. Yes, sir.

Q. Do you remember the time the hearing was had in this court on the motion to dissolve the temporary restraining order? A. Yes, sir.

Q. You was a witness here then, I believe?

A. Yes, sir.

Q. Now, when was you out to these grounds in front of the survey with reference to the hearing on that motion?

A. I think I was—after the hearing was over. I was there about between the 7th or 8th or 9th of April, somewhere along there.

Q. And before the hearing—you was there just before the hearing also? A. Yes, sir.

Q. Now, Captain, there is a paper here or map of the land, that has been offered in evidence in this case and marked exhibit "D," which is the map or plat

(Testimony of P. H. Mason.)

which Mr. Hill made. I will ask you, by acquaintance with the grounds out there and the land in front of Mr. Barron's survey, if this map fairly portrays the matters as you have observed them out there in [324] regard to the fish-trap, the contour of the shore line and these reefs and the observations that appear on there particularly?

A. Yes, sir; I think they do, in fact, I know it does.

Q. Yes, sir. Now, Captain, at the time that—that the—at the time the hearing was had on the motion to dissolve the temporary restraining order how much of that trap was in at that time? Can you go to this exhibit and state to the Court how much was in at that time?

A. Well, I counted the piles myself.

Q. Yes, sir.

A. Well, I counted them over three times and I made it different; one was 39; one was 41; and one 42; so I calculated there was about 40 piles.

Q. Yes. Now, if you will come over to this exhibit, which I have just referred to, which is D, and state to the Court about what portion of the trap—I don't mean as to whether or not that the heart and filler (spiller), and so forth, and so on, the spiller and so forth in the same condition as they were in this map, but I mean as to the length, and so forth, about. What part of the trap was completed at the time the hearing was had upon that motion?

A. Well, taking this here, this is D, there was that part was finished to the westward.

(Testimony of P. H. Mason.)

Q. That is the part marked "Barron's piles"; it was completed out that far? A. Yes, sir.

Q. And then went down to the heart?

A. This wasn't complete.

Q. Yes, but the lead down to the heart was completed? A. Yes, sir.

Q. At that time—but the heart and the other part of it— [325] big part of the trap was not completed upon that hearing? A. No, sir.

Q. Now, Mr. Mason—Captain, you can just take your seat. I will ask you if you was in the courtroom at the time Alexander testified. A. I was.

Q. On the hearing on that motion. I will ask you as to whether or not you heard him state at that time that his trap was complete all with the exception of putting in eight piles which were to go in somewhere about the heart and the spillers of the trap?

Mr. CHENEY.—Object to that, if the Court please, on the same ground, that it is immaterial and not competent for this witness to tell at this time what he heard Mr. Alexander state.

COURT.—I think the objection should be sustained.

Mr. WINN.—I will take an exception, if your Honor please. I wish to make the same showing with this witness—that we offer to show by him that Mr. Alexander did testify then that his trap was completed there with the exception of eight piles that was to be put in along the heart and spiller and it wouldn't be—would not be constructed so to extend

(Testimony of P. H. Mason.)

any farther toward the shore on either side or end of the trap.

COURT.—The offer objected to.

Mr. CHENEY.—Object to the offer for the same reason and the further reason it is not the best evidence. The evidence is the best record.

COURT.—Objection sustained.

Mr. WINN.—I will take an exception, your Honor.

Q. Now, I will ask you also another question, Captain, while [326] along that line, as to whether or not you heard Mr. Alexander—no, withdraw that question—I will ask you if it isn't a fact that Mr. Alexander also testified upon that hearing that he did not expect to drive any farther out towards the shore on the lead of his trap as it was then constructed?

Mr. CHENEY.—Object to that for the same reason as to the other last question.

COURT.—Objection sustained.

Mr. WINN.—Yes, sir; I will take an exception. I will make the same offer to show that he did testify that he wasn't going to drive any more on his lead and his trap in every respect was complete and he didn't expect to construct his trap so that any piles in it would be any closer to the shore than they were at that time.

Mr. CHENEY.—Same objection.

COURT.—Same ruling and for the reason that the testimony is immaterial at this time.

Mr. WINN.—I will take an exception.

Q. I will ask you if you did not hear Mr. Alex-

(Testimony of P. H. Mason.)

ander also substantially testify upon that trial that the reason that his trap at that time did not interfere with free access or ingress and egress to and from this upland of Barron's was that he hadn't constructed his lead any farther out towards the shore and that the—and that the steamers would have plenty of room to come in there and go back of his trap and any part of the shore, by reason of not constructing any longer lead than he had at that time.

Mr. CHENEY.—Object to that for the same reason. It is immaterial.

COURT.—Objection sustained.

Mr. WINN.—I will take an exception I make the same offer [327] at this time, your Honor, to show that Alexander did testify that was the reason why he said he wouldn't interfere with our free ingress and egress to and from our upland out to deep water was that his trap, as then constructed, was out in navigable water and he didn't expect to run his lead in any further toward the shore.

Mr. CHENEY.—I don't agree with counsel that is the testimony.

Mr. BURTON.—It is one of the allegations in the complaint.

Mr. CHENEY.—For certain sea boats. We say that the boats can go through there.

Mr. WINN.—I offer this testimony—don't understand I am offering for any particular purpose. I am offering for all purposes, that is it is material under our supplemental pleadings, and then it is material to show to the Court even from the conver-

(Testimony of P. H. Mason.)

sation of the defendant in this case that the defendant—appears now from the evidence the way he has constructed the trap that absolutely it does interfere with our free ingress or egress. I don't offer it for any specific purpose. It is for all the purposes in the case on the supplemental pleadings and as giving the view of the defendant in the case and showing the situation. I didn't want to confine it to any specific purpose at all, and I ask that your Honor's ruling is made on all the purposes, and not as going to any specific purpose.

COURT.—The evidence is excluded for the reason at this time that in the trial of this case the plaintiff must show that there is an actual interference with his access. Any admissions that the defendant may have made with reference to that cannot be material. They may become material if the witness—if the defendant takes the stand and become [328] a witness and offers his opinion as to whether it interferes, but at this time it cannot be a part of the plaintiff's case in chief.

Mr. WINN.—I thought your Honor was ruling on it on the general principle. I didn't want Mr. Cheney's remark—but I will state on account of the remarks he made that I wasn't offering it for any specific purpose.

Q. Now, Captain, I will ask you if after you visited this location or at the time you visited this location in April, after the hearing that was had on the motion for the dissolution of the temporary restraining order, as to whether or not you found the trap in the

(Testimony of P. H. Mason.)

same condition as it was in at the time of the hearing, or had it been changed, added to or taken from, or anything, in April?

Mr. JENNINGS.—Object to that, irrelevant and immaterial whether been changed or not.

COURT.—Objection overruled.

Mr. WINN.—You can answer that.

COURT.—Yes, sir.

Q. (By Mr. WINN.) You can answer.

A. The trap had been changed.

Q. Well, will you go over to this exhibit “D” of the plaintiff and just explain to the Court what changes had been made in the trap after you went out—when you went out there in April?

A. This additional line was, yes, sir; then also a line extended further and this was finished, part of the spiller as he calls it here.

Q. You see the piles that Mr. Hill has indicated on here in black? A. Yes.

Q. Extending from those called “Barron’s piles” up to the [329] words “Alexander’s lead shore pile” and so forth, is that the—are those the piles between there you meant had been driven?

A. Yes, sir.

Q. Between those two words I have indicated. Did you—who was with you at that time, Captain?

A. Well, I don’t know—let’s see—Mr. Barker was with me once there when I was out there.

Q. That was in April? A. That was in April.

Q. Well then, you was there later on in the summer?

(Testimony of P. H. Mason.)

A. Well, I was there two or three times in the summer.

Q. Two or three times in the summer? A. Yes.

Q. Now, when you was there later on in the summer had Alexander strung his web over his trap and was he fishing it? A. Yes, sir.

Q. Now, I will ask you to state to the Court in what manner he had his web hung with reference to the space between the last pile in the lead nearest the shore and the shore?

A. He had his line or wire fixed to this last pile, then he had a shear on the beach. This wire was stretched from this pile over these shears and made fast up here to a dolphin of some description. I didn't go to see what it was, and the web was attached to that, hung down to the water.

Q. Then he had one contrivance on the shore that he had it attached to and one on the upland that he had this cable attached to? A. Yes, sir.

Q. And on this cable he had hung what?

A. A web.

Q. Now, how far, Captain, as you remember did this web extend [330] from the last pile in the lead towards the shore? A. Toward this shear?

Q. Yes, sir. A. Toward this shear here?

Q. Yes, sir.

A. Well, at low water the web was hanging on the bottom. It was dry.

Q. Now, Captain, were you out there when Lloyd Hill went out and made soundings?

A. I was this last time.

(Testimony of P. H. Mason.)

Q. Yes, sir; you was this last time. Did you keep track of those soundings?

A. I was handling the lead, myself.

Q. You were handling the lead. Will you explain to the Court where you sounded, on this map?

A. We sounded from here to here (indicating) and then inshore as far as we could get water.

Q. Well, you mean?

A. From this mark; from this location here.

Q. Piles—"Barron's piles"?

A. Yes, sir, in to that end of his piles.

Q. End of the lead?

A. And then as far as the water extended, as far as the boat would go, as far as it would float.

Q. So far as what boat? You mean the rowboat?

A. The rowboat.

Q. Well, now, Mr. Hill has indicated on this map and placed those soundings. Are those soundings here, as indicated by Mr. Hill, as you found them by the measurements? A. Yes, sir.

Q. You didn't help him make these other soundings out there? [331] A. Part of them.

Q. Oh, did you?

A. And this one here, and then afterwards I made these the next day following.

Q. The next day following? A. Yes, sir.

Q. Then you did help him make some soundings from the end of the trap out towards the bare rock?

A. Nearest pile to that place.

Q. Yes, nearest pile to that place. And the sound-

(Testimony of P. H. Mason.)

ings, as indicated upon this exhibit "D," are they as you found them on the ground? A. Yes.

Q. And in the water as you measured them?

A. Yes.

Q. Now, Captain, I will ask you if you have ever had any experience in leading in there—in making soundings on the right-hand side of the lead of the trap as you come in to Barron's claim 804?

A. I have paid particular attention to the subject to out 600—from 500 to 600 yards north from this trap to the eastward.

Q. Yes.

A. And I sounded the bottom and I know, if I have any judgment, that it was—that the lead would strike, it was rocky and the nearer I approached the trap from the east the less rocks I had to contend with.

Q. Well, what would you say about the—about the ground that is between this lead of the trap and the prolongation of the easterly end line of Barron's claim as to whether or not that is as good for driving piles and anchoring as the ground is between that lead and this peninsula? [332]

A. This lead here is—this bottom here?

Q. No, the bottom here. You mean on the right-hand side?

A. To the right of the trap, to the eastward of the trap, I am speaking now all this time.

Q. Yes.

A. This bottom to the east of the trap, so far as my judgment is concerned and with the indication of the

(Testimony of P. H. Mason.)

lead is, provided you are to anchor or to drive piles, this I don't think you can drive in this ground.

Q. Why, Captain?

A. Because the bottom there is rocky and there is a shelf of rocks making off, right off here.

Q. Making off from the upland?

A. Making off from the upland in a westward direction at right angles to this trap.

Q. Now, at certain times you have gone in there to anchor and find shelter. Where is the place you have gone in to anchor with reference to Barron's claim and the lead of the trap? Is it on the right or left of the lead of the trap as you come in?

A. I think, as near as I can judge, anchored about here a few fathoms from this lead.

Q. A few what? A. A few fathoms.

Q. Fathoms?

A. To the westward, northwestward of this line—this lead.

Q. Near the mark called "Barron's piles"?

A. Yes, sir.

Q. Now, in reaching this claim of Barron's if you were going in there with a boat, taking in anything, lumber, timber, and [333] so forth, and of course you couldn't get in on the shore with your steamer, where is the best, and in your judgment the only, accessible way of getting to that upland from the deep water, Captain?

A. This is it, if that trap wasn't there?

Q. Yes, sir. A. Anchor here (indicating).

Q. And you would anchor—you would anchor at a

(Testimony of P. H. Mason.)

point between what is called the bare rock and the row of Barron's piles? A. Yes, sir.

Q. On the left of it—of the lead as you go into the bay? A. Yes, sir.

Q. Now, I will ask you if it would be possible to go in there and anchor in order to reach this upland of Barron's with this trap in there constructed as it is constructed? A. I say no, it is not possible.

Q. Well, now suppose that you were going in there to reach this place with a tow of logs for any purpose, building a wharf or building a fish-trap, with a tow of lumber or with a tow of fish, as you have been in the habit to tow, I will ask you whether or not that you can get any where, anchorage, in front of Barron's upland there with that trap constructed as it it? A. No, sir.

Q. Explain to the Court why not, Captain?

A. You haven't the room between here to drop your anchor, the chain there. You would swing either against the trap or else would be too close to the rock and you would have to move at low water any how.

Q. In anchoring a boat the size of the "Anna Barron" or—I will withdraw that question—Are you acquainted with the little [334] gasoline boat "Kodat"? A. Yes, sir.

Q. Have you ever been on her?

A. Not to run her. I have been on her several times, but not to run her.

Q. Well, then we will confine ourselves to the "Anna Barron." Coming in this harbor, if you were

(Testimony of P. H. Mason.)

going in there for any purpose to reach the upland, or any where else to reach the upland of Barron's and wanted to have—had a load on your boat—we will cut out the scow business or towing—I will ask you if just going in there under those circumstances with a load on the boat and you wanted to reach the upland, as to whether or not, Captain, you would consider that you could get in there with any degree of safety with that trap in there without injuring the trap? A. I say no.

Mr. JENNINGS.—Without what, Judge?

Mr. WINN.—Without injuring the trap.

Q. Captain, now, what—I withdraw that question—I will ask you in anchoring a ship, have the steamboat men, masters, got a sort of a rule that they go by as to the amount of chain they should throw out or throw out with the anchor?

A. Yes, yes, sir; that is depends on the condition of the weather and everything like that.

Q. Depends on the condition of the weather. Of course, you take that into consideration when you say you couldn't go in this place and anchor with that trap in there? A. Yes, sir.

Mr. JENNINGS.—He didn't say that.

Mr. WINN.—He said, yes, sir.

Mr. JENNINGS.—He didn't say he couldn't go in there and anchor [335] with this trap in there.

WITNESS.—I did. I stated it.

Q. (By Mr. JENNINGS.) You said you couldn't go in there and anchor without injuring the trap?

A. No, sir; I did not.

(Testimony of P. H. Mason.)

Mr. JENNINGS.—I appeal to the record.

Q. (By Mr. WINN.) Of course, Captain, if you can run through the trap—if you run through the trap and tear it down, could get in there and anchor then, couldn't you? A. Yes, sir.

Mr. JENNINGS.—You didn't say interfere with your anchoring. You say interfere with the trap. We are not bringing injunction against Mr. Barron. He is bringing an injunction against us.

Q. (By Mr. WINN.) Would it be safe, Captain, for your steamers to lambast against that trap there, in order to anchor with the trap in there the way it is now? A. No, sir.

Mr. WINN.—You are technical about this.

Mr. JENNINGS.—No; I am not technical. You are trying this case on the assumption we are bringing the injunction against you and not you against us.

Q. (By Mr. WINN.) Now, Captain, you stated that you have sounded and tested the bottom on the right-hand side of the trap as you go in. I will ask you to state to the Court as to whether or not you would consider the space between the prolongation of the east end line of Barron's claim—between that line and the lead of the trap, if you would consider that this would be a safe place to go and enter to reach the upland of Barron's for anchoring purposes or any other purpose? [336] A. Would not.

Q. How—how does the water,—Captain,—well, I withdraw that question— How is this part on the right-hand side of the trap with reference to being

(Testimony of P. H. Mason.)

exposed to the waters of Chatham Straits down the channel? A. The waters?

Q. Yes, sir. It is all water, isn't it?

A. Yes, sir; this is all water, the whole thing. The further you get this way the more you are exposed to that wind no matter whether from the northward, west or anywhere else.

Q. The further you get to the east?

A. Eastward of the trap the more you are exposed to Chatham Straits.

Q. Now, Captain, from your knowledge of that water, I will ask you to state to the Court where the natural, reasonable outlet to deep water from this upland of Barron's is—over what part of that water in front of it, in reference to where the lead of the trap is? A. Well, is this one corner here?

Q. This is—no, sir. A. This up here?

Q. Yes, sir.

A. Well, this is one corner (indicating).

Q. No. Corner 1 of Barron's claim is this little square up here. A. That is right in there?

Q. Yes, sir. Now, I am asking in front of that property of Barron's—I don't care whether you consider in front of the property clear out to the peninsula or not, but I will ask you where is, knowing that harbor as you do and from the soundings, and so forth, where is the natural route or [337] access of ingress or egress to Barron's property?

A. Right here (indicating).

Q. That is between the—between the lead line of Alexander's trap, as it is given, and the prolongation

(Testimony of P. H. Mason.)

of the westerly side line of Barron's homestead?

A. Yes, sir.

Q. Well, about midway between there?

A. Yes, sir.

Mr. CHENEY.—Well, that is granting a good deal for the attorney to testify to things that the witness has never said. It has been that way all the time. We haven't objected, but Judge Winn is testifying right along.

COURT.—No, the counsel is endeavoring to describe on the map where the witness points out, Mr. Cheney.

Mr. CHENEY.—But the witness is capable of telling that himself.

COURT.—That may be true. Can't harm anything.

Q. (By Mr. WINN.) I will ask you, Captain, as to whether or not this trap then as it is now constructed would obstruct the ingress or egress in to and from this upland over this route that you have just described?

A. This trap, as it stands—the situation is now—absolutely obstructs the whole harbor.

Q. And when you say the whole harbor, do you mean the whole of the frontage of Barron's claim?

A. The whole frontage of Barron's claim. The frontage of this bare rock here, as you have termed it.

Q. You can be seated now, Captain. I understood you, Captain, did you, if not, or do you or would you say you had sounded on the right-hand side of the lead of the trap as you go into this upland of Barron's?

(Testimony of P. H. Mason.)

You have sounded there?

A. I have sounded to the eastward of the trap.
[338]

Q. Yes, sir.

A. Yes, sir; taking Mr. Alexander's cabin and making a direct line to the westward from that.

Q. Yes.

A. Which would give you at the end of that north end of his trap some thousand feet, I guess.

Q. Now, where is Alexander's cabin with reference to what is indicated on this map here, U. S. Survey Number 804?

A. Mr. Alexander's cabin is away off here.

Q. Well, let's put something there.

A. Right there (indicating).

Q. Let's put the letter "A" there.

A. Yes.

Q. Then you say Alexander's cabin then would be approximately where I have marked the big letter "A" with a pencil? A. Yes, sir.

Q. Now, you have sounded from, taking that as one point and another point down here?

A. I come off, right straight westerly, angling that way, right down until I got to this place, right here.

Q. Across toward the lead?

A. Across toward the lead.

Q. Now, I understand your testimony, so as to make it plain, you have sounded right straight down from the letter "A" until you reached a point pretty nearly opposite the heart or spiller?

Mr. CHENEY.—He didn't say heart or spiller.

(Testimony of P. H. Mason.)

Said the opening, the opening of this line, where it opens on Chatham Straits.

Q. (By Mr. WINN.) Well that is pretty near the heart or spiller. If you will just let me alone I will get it into the record [339] as near I can. You meant you have made the soundings where that letter "A" is and down out towards the heart or spiller?

A. Yes, sir.

Q. And a little beyond the heart and spiller into deep water? A. Yes, sir.

Q. Now, Captain, from these soundings you have made and I believe you testified a while ago as to what you ascertained, if you didn't—

A. Yes, sir.

Q. —I wish you would. A. I did.

Q. You stated what you ascertained from that?

A. Yes.

Mr. BURTON.—He didn't testify as to the depth of the water at the end of the lead.

Mr. WINN.—Yes, he did.

Q. You testified a while ago that you helped to make these soundings? A. These soundings.

Q. These soundings along the lead?

A. Yes, sir.

Q. And that the figures put on the map or plat there are correct? A. Yes, sir.

Q. Yes. Now, you helped to make these soundings. Just take your seat, Captain. You helped to make these soundings when Lloyd Hill was out there on the 11th of March? A. Yes, sir.

Q. Have you a tide-book here? I will ask you,

(Testimony of P. H. Mason.)

Captain, on the 11th of March as to how the tides run then, that is, as to whether they were extreme low, high or medium? [340]

A. No, sir; they were small tides.

Q. Small tides? A. Yes, sir.

Q. What do you mean by small tides?

A. Small tides is small run out and a small flood; that is, less than medium; was extremely small, if I am correct.

Q. Now, I will ask you, Captain, if you will take the tide-tables, which is an official pamphlet of the Department of Commerce and Labor and which is used by navigating men, and to estimate approximately from the measurements which you took on the 11th day of March, finding, as you say, the water eight feet deep at a certain time at the place where this last pile in the lead is, nearest to the shore line, and tell approximately how far then it would be from that pile at low tide on the 11th of March to the shore line? A. When we took these soundings?

Q. Yes, sir.

A. It was within one hour of low water then, but you take the mean long run out and at the end of that pile there wouldn't be two feet of water.

Q. That is the mean run out? A. Yes, sir.

Q. There wouldn't be two feet of water. Now, in the extreme low tides how would that pile be?

A. Well, that is what I meant when I said at low water.

Q. Yes; at mean low water? A. Yes, sir.

Q. Now, suppose—how do you think it would be in

(Testimony of P. H. Mason.)

the June tides, and so forth, when extreme high or extreme low?

A. At that time there wouldn't be over two feet of water.

Q. What do you mean by the mean low—you have to average it [341] up and get it for the year around? A. Yes, sir.

Mr. WINN.—That is all at present, your Honor.

COURT.—Cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Captain, how many years did you say you had been employed by Mr. Barron? A. This is the third year, sir.

Q. You have been—you have been running the “Anna Barron,” then, for about three years, have you? A. Will be when I finish this season.

Q. And during all that time you have only used this harbor twice to run in with a tow of logs?

A. That is all I have.

Q. And those logs came from Kelp Bay?

A. Yes, sir.

Q. You have never gone in there with any logs from Fresh Water Bay?

A. Never towed any from Fresh Water Bay before this year.

Q. Not before this year? A. No, sir.

Q. Haven't towed any this spring? A. Yes, sir.

Q. You have?

A. I haven't, but the “Buster” has.

Q. How many booms has the “Buster” brought up? A. One.

(Testimony of P. H. Mason.)

Q. Just one, and that is the only one towed from Fresh Water Bay at all? [342]

A. To my knowledge.

Q. To your knowledge? A. Yes.

Q. Now, do you remember that boom that you did bring in? What boat did you say brought that in?

A. The "Buster."

Q. The "Buster." Do you know whether or not they had to run in there for shelter that day?

A. They was into Hawk Inlet.

Q. They was into Hawk Inlet?

A. Or just outside of Hawk Inlet. Didn't go up to the cannery, but just went inside. He didn't say—the captain says, "Well, I had to go into Hawk Inlet and lay over night," and I didn't ask him any more or any more about it.

Q. Well, so far as you know, Captain, then only on two occasions in the last two years and a half, we will say, have the boats, that is the tow of logs, gone into this little harbor there, this harbor we are speaking of?

A. That is only twice I have been in there, but remember—wait a minute—remember I have only made six trips down to Kelp Bay and the six trips I was in twice.

Q. That is in with a tow of logs? A. Yes, sir.

Q. Or with a— A. With trap piles, not logs.

Q. What? A. With trap piles, not logs.

Q. Well, trap piles. The other times you just went right on up the Straits and went into Funter Bay and went right in? A. I did.

(Testimony of P. H. Mason.)

Q. Now, you said, Captain, in answer to Judge Winn's question, you said that if the "Anna Barron" went in there between the [343] point called bare rock and the trap and anchored that it wouldn't be safe for the boat, that is, when anchored midway between that lead and that bare rock, wouldn't be a safe place to anchor the boat? A. It would not.

Q. And then you said you would have to move at low water anyhow? A. Yes, sir.

Q. So, then by that, Captain, you mean when low water came you would have to move further out?

A. Move further out.

Q. Then the trap wouldn't cause you to move out? You would have to move on account of low water?

A. If the trap wasn't there wouldn't anchor there in the first place.

Q. You wouldn't anchor there in the first place?

A. Not where you would now.

Q. I see. If you did anchor there you would have to move out. Now, if you anchored there at the same place, Captain, as you mentioned in answer to Judge Winn's question, and no trap there at all, you would have to move out at low water? The trap wouldn't have anything to do with it?

A. Well, I wouldn't anchor.

Q. Well, if you did anchor and the trap wasn't there when you went in there at the same place you have mentioned in answer to Judge Winn's question?

A. I am answering this now. I am not answering Judge Winn.

(Testimony of P. H. Mason.)

Q. I understand, but if you did go in there, Captain, and anchored and had to move out on account of low water, wouldn't make any difference whether a trap was to the westward or not. You will move away on account of the low water? That is what I am trying to get at.

A. Certainly the trap would make a difference.
[344]

Q. Wouldn't make any difference about your moving on account of—moving on account of low water?

A. Have to do that, certainly for anything.

Q. Certainly, have to move on account of low water? A. Yes.

Q. If you ran the "Anna Barron" up here any time before this trap was ever built, up in here between the lead of Alexander's and this point called bare rock, and anchored and it comes low water, you would have to move out, move your big boat out, wouldn't you?

A. If I was too near there, wasn't water enough to swing clear.

Q. Yes. You testified before in the trial of this case that you didn't consider it safe for the "Anna Barron" to go through between the trap and the point? A. I know it.

Q. Well, now in answer to Judge Winn's question a few moments ago, what part of this trap did you intend to tell the Court had been put on there since the trial of this case last year? Do you mean this forty feet that is in this square here? A. Yes, sir.

Q. That is what you mean. You don't mean this

(Testimony of P. H. Mason.)

part has been put on out in here in the pot of the trap? I want to find out what you meant when you testified.

A. This is all under water he called the heart.

Q. Yes, that is there.

A. This piece was attached.

Q. And this was there, wasn't it?

A. This was partly finished, but not completed.

Q. But this in the center was, wasn't it? Now, and this pile of the lead nearest to this point as the trap existed last year, when you testified, Captain? [345] A. Well, this would be.

Q. Right here? A. Yes.

Q. Between the additional space that is from here there—from there over to here, whatever that measurement is? A. Yes.

Q. There would be that many feet, whatever it is, from the pot over to here, would be the difference between last year and this year? A. Yes.

Q. Do you know what distance that is?

A. Not exactly.

Q. What do you think? A. About fifty feet.

Q. That is you are making that your estimate?

A. Yes, approximately.

Q. Now, Captain, if you were coming up Chatham Straits with a tow of logs or with a tow of fish and there was a southeaster blowing good and hard, or a south wind blowing or a southwest wind blowing or east or west wind blowing, that is a good hard one—

A. Yes.

Q. —you wouldn't go into that harbor?

(Testimony of P. H. Mason.)

A. For a southeaster I would.

Q. You would for a southeaster? A. Yes.

Q. Did you ever go in there when a southeaster was blowing? A. Yes, sir.

Q. When? A. Last summer. [346]

Q. Last summer?

A. Yes. Nothing special, just to go in to see—wanted to see what was in there.

Q. You went in there and found it a pretty safe harbor? A. Safe enough for the “Anna Barron.”

Q. This is this past summer? A. Yes, sir.

Q. Well, now, Captain, I want to ask you something about this business over here. You didn’t testify anything about this last year, about measuring that ground over here? A. I hadn’t measured it.

Q. You hadn’t measured it? A. No, sir.

Q. Well, now, if you will come down here, Captain. I understand you to say that this expresses where Alexander’s cabin was? A. Yes, sir.

Q. About six or seven hundred feet east of this claim? A. More than that.

Q. More than that? A. Yes.

Q. More than six or seven hundred feet. Now, will you place it here? I understand this line of the lead down here is south. A. No, west.

Q. You call that west?

A. Well, that is facing the upland, that would be west.

Q. Started out from the upland leading into Chatham Straits? A. Yes.

Q. And then you made soundings out in here (in-

(Testimony of P. H. Mason.)

dicating)? A. Yes, sir.

Q. Well, this place, this other place down near here you made the sounding as near as you can tell?
[347]

A. Well, I can tell the place I made three at right angles right across this way.

Q. And this place down here, that the first one?

A. In here.

Q. Well, I thought you sounded a line down here?

A. Well, I sounded a line down here.

Q. Well, place— A. Take it here then.

Q. Well, you sounded there, here and here?
Where is the furthest one you say?

A. To the southeastward.

Q. Yes, to the southeastward? A. Right here.

Mr. JENNINGS.—Mark it a little different.

WITNESS.—I understand that.

Mr. JENNINGS.—I know, but we want to get it in the record. Now, the first point he wants, just mark "B."

Mr. CHENEY.—The first one is "A."

Mr. JENNINGS.—That is "A." Get it all mixed up if you have the same numbers.

Q. (By Mr. CHENEY.) Well, if you mark this one "B" and that one "C." A. All right.

Q. "B" and "C." Now, this one was, as you stated to Judge Winn, about on a line with the entrance of the— A. Yes, sir.

Q. —harbor, what you call the entrance of the harbor. Now, did you sound any between here and the trap? A. Yes, sir.

(Testimony of P. H. Mason.)

Q. On a line?

A. As near as could run it with a steamer. [348]

Q. As near as you could run it with a steamer?

A. Yes, sir.

Q. You was doing this sounding with the steamer?

A. Yes, sir.

Q. The "Anna Barron"? A. Yes, sir.

Q. Well, about how far apart were your soundings in here, Captain?

A. Just as fast as we could throw the lead line in and heave it.

Q. How far about would that be?

A. Not over a hundred feet.

Q. Not over a hundred feet? A. No, sir.

Q. Well, let's see "B" and "C" and another place, mark it "D," about where do you think that point would be from this one, over in this direction, this is about 100 feet this way? A. Well, in here then.

Q. All right, "D." And you sounded over to the trap in that line?

A. With a line, yes; I say approximately, may have been further out this way.

Q. Over there about south of where that reef of rock marked "reef" is? A. Yes.

Q. Well, now, will you tell the Court about what depth of water you found here at the point, about?

A. Oh, twenty fathoms.

Q. Would be over twenty?

A. Well, say twenty fathoms and a half; about twenty fathoms would be accurate.

Q. About twenty fathoms? A. Yes. [349]

(Testimony of P. H. Mason.)

Q. I will put just twenty there then, Captain. Now, what is your estimate that the water would be at point "D"? A. Well, say twenty-five fathoms.

Q. Twenty-five fathoms; mark that twenty-five.

A. Yes; mark it twenty-five.

Q. And then as you came over to the trap it was still deeper? A. No, sir; here it was less.

Q. It was less in here. About how many fathoms in here?

A. I don't think it was over fifteen. I am not positive, but I don't think it was over fifteen.

Q. Let's say ten—mark this approximately in here, Captain? A. Yes.

Q. In there about how many fathoms?

A. About fifteen.

Q. Fifteen. Well, now, Captain, you say the "Anna Barron" is about ninety feet long?

A. Yes, sir.

Q. Well, in order to be very safe, you think that Mr. Barker is about correct when he says she needs about 250 feet of line so she could swing in a circle of 500 feet?

Mr. WINN.—Mr. Barker didn't testify to that.

Mr. CHENEY.—Mr. Barker did.

Mr. WINN.—No, he did not. You have got him mixed up with Mr. Barron. Doesn't make any difference.

Q. (By Mr. CHENEY.) Well, then we will ask the Captain, how many feet is the usual swing then?

A. Depend on the water.

Q. I don't mean with a storm on, Captain?

(Testimony of P. H. Mason.)

A. Ordinarily?

Q. Yes; ordinarily. [350] A. About 300 feet.

Q. About 300 feet. Well, now you would want for a boat like that coming up to the waterfront you would want plenty of deep water, wouldn't you? You wouldn't want to run here into shallow water?

A. Well, I go into water that is safe for her to lie afloat. Don't care whether extraordinarily deep water.

Q. Well, the way you have marked this up here from this line east, from this line of piles over to this point called bare rock you have got it marked 16 or 12 feet, is it, or fathoms? A. Fathoms, yes.

Q. You wouldn't consider that a safe place at any time for a boat landing, place for a boat of that size?

A. Yes, 16 feet.

Q. 16 feet. 12 feet? A. Not 12 feet.

Q. No, not 12 feet, but 16 feet or deeper?

A. Well, ordinarily should be; don't want perfectly shallow water.

Q. But if the tide runs out and you had to move, as you stated a while ago you would have to go out with the low water any way, you would have to go back from this line to get deeper water when the tide runs out? A. Come out this side.

Q. Have to come out further? A. Southeast.

Q. Yes. Well, now, looking at this matter just as a question of where the most feasible place would be to run in with the "Anna Barron," supposing there is no trap here at all, Captain, haven't anything in front of that ground at all? A. Yes. [351]

(Testimony of P. H. Mason.)

Q. You say that the most feasible place is, as you stated here to Judge Winn, to come right in through here up towards this end of the beach, about midway between the line of piles and the place called bare rock? You say that is the feasible place to come into the upland, do you? A. Yes.

Q. What? A. Yes, sir; I certainly do.

Q. As a matter of fact, Captain, you know that this is a—there is a shelf in here or we might call it a back—I don't know, I am not a seafaring man, you know—but any way it is much shallower in here, Captain, than it is in front of the eastern part of this claim, isn't it? This is the deeper water over here?

A. Over here, no, sir; I think so.

Q. Yes.

A. I don't think anything about it. I know it.

Q. Yes. You know it is much deeper water. Now, with a southeaster blowing, you say you consider that a good harbor for a southeaster?

A. Fairly good harbor.

Q. Fairly good harbor. You consider that a fairly good harbor. You wouldn't say it was a good harbor? A. No, sir; I would not.

Q. But when there is a southeaster blowing, we will say, you mean to tell the Court now you would consider it a safer place for the "Anna Barron" to lie at anchor over in here, in this line, between the lead and the bare rock, midway, than it would be over here in the deeper water?

A. Yes, I would anchor here.

Q. What? [352] A. I would anchor here.

(Testimony of P. H. Mason.)

Q. You would anchor in here on eastward of the trap?

Mr. WINN.—About where is here?

Q. (By Mr. CHENEY.) Now, if you were coming in here and wasn't any trap at all—

Mr. WINN.—I would like to have the pencil put on the part of the water.

Mr. CHENEY.—Where this trap is.

COURT.—Ought to have it marked, Captain.

Q. What figure is that?

A. That is an "X," just put that as a cross near to indicate that figure.

Q. All right.

Q. (By Mr. WINN.) About where the words—
what words are there? A. No words there.

Q. (By Mr. CHENEY.) Well, Captain, you just simply say if there wasn't any fish-trap here at all and you were coming in here with a southeaster blowing, you would consider this a better anchorage than you would in here, that is what I understand you to say?

Mr. JENNINGS.—That doesn't get it into the record.

Q. (By Mr. CHENEY.) Well, you would consider it a better anchorage on the east side of where the trap is now located than you would on the west side of the trap? A. Of course, I would.

Q. Yes, because it is deeper water out in here?

A. Yes.

Q. Yes. A. Got more room.

Q. Now, Captain, isn't it a fact that there is at

(Testimony of P. H. Mason.)

least 125 feet of level land to the eastward of this place marked "high [353] bluffs" and between these places, the place marked "high bluffs" and the east line of this claim, isn't that low land?

A. No, it is upland.

Q. What? A. It is cliffs.

Q. Cliffs? A. Yes.

Q. Do those cliffs extend clear out to this line?

A. Yes, sir.

Q. They do? A. They do.

Q. Then Mr. Hill's map where he has marked it "high bluffs" out to here and stop, isn't correct? If you were making this map you would have made the cliffs, high bluffs, clear out here?

A. No; not clear out; I wouldn't do it too far, but I would just say the cliffs did go to here, within a few feet of that.

Q. Within a few feet of this eastern line?

A. Yes.

Q. Did you ever build any wharves, Captain?

A. Not actually had the control of doing it, but I have helped do it and seen lots of them and have an idea how it should be done.

Q. If you were going to build a wharf and you had two places to build it from and the ground was the same, Captain, in front of each place, but at one place the shore was shelving and shallower there, and you had to go out, say, 500 feet from the line of ordinary high tide, and at the other place you would only have to go out about 200 feet to get sufficient depth of water, which would in your opinion be the best and

(Testimony of P. H. Mason.)

cheapest place to build that wharf? [354]

A. You have asked me two questions.

Mr. WINN.—Now, wait. It isn't a proper hypothetical question. The hypothetical question must be based on some evidence—evidence in the case.

Mr. CHENEY.—His evidence is in the case.

Mr. WINN.—I didn't go into the question of the Captain being an expert wharf builder, but I don't object to that ground, but I say it isn't a proper hypothetical question, not based on anything in this case.

Mr. CHENEY.—I base it on this witness' testimony.

COURT.—Just read the question.

Q. (Read by Reporter.) If you were going to build a wharf and you had two places to build it from and the ground was the same, Captain, in front of each place, but at one place the shore was shelving and shallower there, and you had to go out, say, 500 feet from the line of ordinary high tide, and at the other place you would only have to go out about 200 feet to get sufficient depth of water, which would in your opinion be the best and cheapest place to build that wharf?

COURT.—He may answer the question. Objection overruled.

Mr. WINN.—I will take an exception.

Q. (By Mr. CHENEY.) You understand the question now, Captain?

A. Well, are you referring to this particular place?

(Testimony of P. H. Mason.)

Q. I am just putting the hypothetical question.

A. To answer at random to some other place?

Q. Just for an answer, that is all.

Mr. WINN.—I object because no sufficient foundation laid; not proper cross-examination, and not a proper hypothetical question.

Mr. CHENEY.—The objection has been ruled on.

COURT.—He may answer. [355]

Mr. WINN.—I put some other grounds to the objection.

COURT.—He may answer.

Mr. WINN.—I will take an exception.

A. Well, taking any place.

Q. (By Mr. CHENEY.) I am not confining you to any particular place, Captain.

A. Is the cheapest place the littlest distance you have to drive a wharf if the grounds are equal would be the cheapest way.

Q. And if you were driving a wharf under those conditions, of course, you would drive the shortest wharf, that costs the least money?

A. I would if I had the doing of it.

Q. In other words if the driving ground is equal, the same kind of driving ground, if you can reach deep water, say, 35 or 40 feet of water with a dock of 200 feet, you consider it would be much better and cheaper to build it there than where you have to run 500 feet to get the water?

Mr. WINN.—That is self-evident.

COURT.—Yes, that is self-evident.

Q. (By Mr. CHENEY.) Yes, I suppose so.

(Testimony of P. H. Mason.)

Well, you say—you said, Captain, that the water is much deeper over here in front of the east end of this claim than it was in front of this other, the sandy beach on the west end? A. Yes, sir.

COURT.—Any further cross-examination, gentlemen?

Mr. CHENEY.—Yes, I am through.

Mr. JENNINGS.—I want to ask a question.

Q. Captain, I call your attention now to that part of exhibit “D”— A. That is “A” up there.

[356]

Q. Plaintiff’s Exhibit “D”—on Plaintiff’s Exhibit “D” you see a place marked “bare rock” and a place marked “reef” and you see the pot and filler (spiller) and the heart and the filler (spiller) of Mr. Alexander’s trap and you see the lead line of Mr. Alexander’s trap? A. Yes, sir.

Q. Now, I want to call your attention to the space in between there, what is the nature of the space—of the bottom—the nature of the bottom there in that space, is it rocky, sandy or good holding ground, or what?

A. Well, from the indications that we get with the lead it is what I call a medium bottom, neither sandy nor muddy, but when the lead strikes the bottom it strikes hard, but we don’t strike rocks.

Q. Good driving ground though, isn’t it?

A. Very good.

Q. Good driving ground from—from the shore line clear out to Alexander’s—to the heart of Alexander’s trap, isn’t it? A. Yes, sir.

(Testimony of P. H. Mason.)

Q. Over in that space. Well, now if a wharf were built beginning at the point marked "low" on the beach line of this claim, you see the word marked "low," and extended out to a point midway between the point marked "reef" and Alexander's trap, wouldn't there be plenty of room for the "Anna Barron" to go in and tie up to that wharf?

A. Not with a trap there.

Q. Why not?

A. Because there is not room.

Q. Why, how long is the "Anna Barron"?

A. Ninety-odd feet.

Q. What beam has she got? [357]

A. I think twenty-five.

Q. Twenty-five feet beam and ninety feet long. What is the distance between the reef and the pot, the pot of the trap? A. 300 feet, I guess.

Q. 300 feet? A. Yes.

Q. Now, mark you, Captain, I am not talking about the "Anna Barron" going in there with a tow of piles. I am talking about the "Anna Barron" going up there and landing, just like steamers land at wharves, just like the wharf at Haines or the wharf at Douglas, or the wharf at any other—Killisnoo, or any other of the little ports around here, you mean to tell me that the "Anna Barron" couldn't go up there and discharge her—her carboys of gasoline or oil and just put that on the wharf and come out, you don't think there would be room for the "Anna Barron" to do that? A. I do not.

Q. Notwithstanding it is—how far did you say?

(Testimony of P. H. Mason.)

A. I am not exact, but I think about 300 feet.

Q. 300 feet, and the "Anna Barron" is only twenty-five foot beam and ninety feet in length?

A. Yes.

Q. There is plenty of water there, isn't there? There is plenty of water there, isn't there?

Mr. WINN.—Now, if your Honor please, I want to object to the question—

Mr. JENNINGS.—Which question?

Mr. WINN.—The question right now.

Mr. JENNINGS.—The question I put to him, I am propounding now.

Mr. WINN.—Yes, sir. If it please the Court, it was understood some time ago that portions of the testimony of [358] that kind would go in under objections, but I wish to state my objection to this question so to get the record clear on it; that he should confine himself to this land in front of us and not to the land clear over here in front of the reef. We don't own this; don't claim it.

Mr. JENNINGS.—I say between the line of the lead and the eastward.

Mr. WINN.—Yes; the reef is beyond the extension of our claim; simply want to get the object—incompetent, irrelevant and immaterial for any purpose because the distance between the heart and the filler (spiller) of the trap, and the reef is one-half or two-thirds of it in front of other land that is not owned by us and that we simply are asking for access over the water that lies immediately in front of our property. I think therefore the question is incom-

(Testimony of P. H. Mason.)

petent, irrelevant and immaterial unless it is confined to that space. Now, in order to save objections extending to this kind of questions, may it be understood that this objection goes to all questions asked the witness when he goes outside the boundaries of our property or outside of the water in front of our property. Is that understood?

COURT.—Yes.

Mr. BURTON.—And this applies also to the question Mr. Jennings asked about building a wharf from that point of the upland and out beyond the prolongation of the southeasterly end line of that claim to a point midway between the reef and the piles.

Mr. WINN.—I think he confined the wharf by the proper boundaries, but now coming to measuring the water; not giving us a right of way over somebody else's property. We are not asking for somebody else's water. [359]

Q. (By Mr. JENNINGS.) You say the reason the "Anna Barron" couldn't get in there would be on account of the water. Plenty of water there?

A. Yes, sir.

Q. Yes. Now, how far did you say it was from the reef to the trap?

A. I think approximately from the—about from the northern end of that reef is 300 feet.

Q. From the end of the reef to the trap is 200 feet?

A. 300 feet.

Q. (By the COURT.) 300 feet? A. 300 feet.

Q. (By Mr. JENNINGS.) Now, how much room do you want for a steamer that is only 90 feet long

(Testimony of P. H. Mason.)

and 25 foot beach. How much more room do you need?

A. There are at times you can't turn the "Anna Barron" around or any other steamer in 500 feet.

Q. I didn't ask you about turning her around. You can back out? A. Sometimes you can.

Q. Doesn't the "Anna Barron" back?

A. Of course she does.

Q. A steamer going into a wharf doesn't always turn around? A. Not always.

Q. Quite often can't turn around, have to back out. Well, how much—suppose you have 325 feet distance between the reef and the—and the trap, would you say she could get in there then?

A. She can go in.

Q. And come out? A. Yes.

Q. Well, now, Captain, if the distance between that reef and the [360] trap is 330 feet, there wouldn't be any doubt about it, would there?

A. Yes, there would be a doubt about it.

Q. Well, you just now said she could come in if there was 325 feet. If she could come in with 325 feet and out again, when I asked you about 330 feet you say there is a doubt about it. I don't understand it?

A. Well, we will say she can come in.

Q. She could come in? A. Yes.

Q. She could come in and discharge her cargo and get out?

A. By placing that wharf out at that place and you couldn't hold a wharf there, wouldn't be safe

(Testimony of P. H. Mason.)

to put a wharf.

Q. I didn't ask you anything about that.

A. That is right.

Q. I just asked you if room enough for the "Anna Barron" to come in and you just now testified that was all good holding ground in there and just now testified—

A. I didn't—my experience is that is good hold ground, certain parts of it. I put the pencil where it is good holding ground.

Q. Well, now, if you call it good holding ground at those particular places—

A. Only between the line that is where I have tested down to the bottom.

Q. Well, I asked you if at all these places around there you sounded and made soundings, lead soundings here and whether or not you found the same general conditions in one place as you did at the other, in this space, the formation, and you said yes.

A. But you got your hand around in there in about every place. [361]

Q. Just where you made soundings here and where your soundings are?

A. Well, so far as I can tell the bottom is about the same.

Q. About the same? A. Yes.

Q. Well, then, why did you say you couldn't hold a wharf out there?

A. I won't say that you can't hold that, can do anything.

Q. Well, why did you say you couldn't hold a

(Testimony of P. H. Mason.)

wharf out there?

A. You can; you can hold it anywhere.

Q. You can build a wharf out there?

A. Anywhere you can get bottom.

Q. You can build a wharf out there that would hold there, wharf for the "Anna Barron" to get in and discharge her cargo and get out without interfering with that trap or without that trap interfering with it?

A. No, sir; that trap interferes with the whole thing.

Q. I am not talking about mooring logs or mooring piles or anchoring the "Anna Barron." I am just talking about a wharf, a discharging wharf. You mean to tell me that the "Anna Barron"—that a wharf couldn't be built there at all where the "Anna Barron" could have a landing place?

A. No, sir; I do not. I just said you can build a wharf anywhere you want to that the "Anna Barron" can get to or any other steamer.

COURT.—Is that all, gentlemen?

Mr. JENNINGS.—No, just one more.

Q. You say that you couldn't get in and you seem to say that this trap would interfere with that as a harbor for going in there if you had a tow of logs. How do you expect to get in there as a harbor if Mr. Barron builds a trap in there? [362]

A. I don't know whether Mr. Barron is going to build a trap in there or not.

Q. If he built a trap there, it would absolutely destroy the harbor as a harbor of refuge?

(Testimony of P. H. Mason.)

Mr. WINN.—I object to the question as not a proper hypothetical question; not proper recross-examination, your Honor.

Mr. JENNINGS.—I withdraw the question.

Q. Now, you said, Captain, that a fish-trap built there is an absolute menace to navigation?

A. To that harbor.

Q. Yes, sir.

Mr. WINN.—Let him answer.

COURT.—Yes.

A. Quite long. I don't understand the question properly.

Q. (By Mr. JENNINGS.) Now, you said, Captain, that a fish-trap built there is an absolute menace to navigation? You said that?

A. I say that trap the way it is constructed now is absolutely a menace to navigation to that particular upland.

Q. Well, then that trap in that neighborhood, in that little harbor, is an absolute menace to navigation running out into that harbor—is a menace to navigation?

Mr. WINN.—Now, wait a minute. This is just the very same question that Mr. Jennings asked a few minutes ago. Of course, now that gets around to another condition of affairs. Suppose we constructed another trap down here any way, or over here in this side line, or constructed [363] it over here. We go into a new field entirely.

COURT.—I think it might be competent for this reason, Judge Winn, it might be that in determining

(Testimony of P. H. Mason.)

this matter, suppose the Court concluded that a portion of this trap was a menace to navigation or prevented you from entering your upland, may be material to know whether a trap can be built there which would not obstruct your entrance.

Mr. WINN.—All right, your Honor, I will withdraw the objection.

COURT.—Although I think it is practically admitted because I understood Mr. Barron to say that was the only place a trap can be built in that harbor.

Mr. CHENEY.—That is what this witness swore to on the last trial. I think he will admit it, that is the only place.

Mr. WINN.—Well, go ahead.

COURT.—He may answer the question Mr. Jennings propounded.

Mr. WINN.—Now, did you get the question. I withdraw my objection.

COURT.—Just read the question.

Q. (Read by Reporter.) Well, then, that trap in that neighborhood, in that little harbor, is an absolute menace to navigation running out into that harbor—is a menace to navigation?

Mr. WINN.—Then on that navigation part—object to it—the question is where we are trying to reach the upland.

Q. (By Mr. JENNINGS.) What is your answer?

A. Any trap built there would be a menace to the harbor.

Q. Would it—any trap built in—any trap built in there in front of survey number 804, be a menace to navigation?

(Testimony of P. H. Mason.)

A. Any trap built on this line the same as that trap is will be an absolute menace to navigation of that harbor. [364]

Q. Could you build a trap in that harbor that wouldn't be a menace to navigation?

A. That I haven't studied to see whether you can or not.

Q. Suppose that trap instead of the lead line being the way it is, suppose the lead line over this way?

A. I think it would be useless.

Q. Well, I am not asking about whether you think it would be useless or not. I am asking you whether that would be a menace to navigation if that line instead of running the way it does now, ran over so it was tied to a post at a point, tied to the upland at a point to the west of survey number 804, would that be a menace to navigation then? A. No, sir.

Q. Wouldn't be a menace to navigation?

A. No, because anybody can go between the trap and the land and you would have plenty of water to the right, but I don't think anyone will ever run a lead that way.

Q. You think that that lead has got to be just in that fix, in that direction and that angle approximately in order for a trap there to be of any use whatever? A. To make a fish-trap out of it.

Q. Do you mean to say, Captain, that you could build a wharf between—on the—that you can't build a wharf on the southeast end of this claim 804 between the end of Alexander's lead and the east end of the claim?

(Testimony of P. H. Mason.)

A. I don't mean to say you can't do anything.

Q. As a matter of fact, Captain, there are piles there are not driven all the way now—driven all along Alexander's lead clear up to the shore, aren't there? A. No, sir.

Q. Up to about how far from the shore? [365]

A. About 140 feet.

Q. About 140 feet? Do you know anything about the shore bottom between that 140—between that—between where his piles range off and the shore? Do you know anything about the bottom?

A. Only just by the lead, by the lead.

Q. You found that, did you? A. Yes, sir.

Q. And you found this what?

A. Hard, rocky bottom.

Q. Hard, rocky bottom, and still you could put a wharf there, couldn't you?

A. I just said you could do anything you wanted to.

Q. And when you get 140 feet out, why Alexander has already driven piles for his lead, hasn't he?

A. I think he has driven piles as far as he can.

Q. I didn't ask you for what you thought. Just asking for a fact. A. That is a fact.

Q. When you get 140 feet from the shore you strike piles of Alexander's? A. Yes, sir.

Q. Well, if he could build piles there somebody else could? A. I suppose so.

Q. If he could drive piles?

COURT.—Any further cross-examination, gentlemen?

Mr. JENNINGS.—No.

(Testimony of P. H. Mason.)

Redirect Examination.

Q. (By Mr. WINN.) Captain, in order to get the matter *before* [366] *the Court remains there* I might have confined my questions to the "Anna Barron" in particular—I wish to ask you another question now. I desire to ask the question if you was going to reach the upland of Mr. Barron's property with any sort of gasoline steamer that are ordinarily used in the fish business, or boats connected with the cannery business, as to whether or not this trap as constructed there would constitute an obstruction to the reaching the upland?

A. Certainly does.

Q. How are the tides there, Captain, around that long—that end of that long peninsula?

A. The tide comes up that peninsula with quite a force, but when it gets up to this harbor it forms an eddy, throwing a back current that it strikes and then comes out maybe 100 feet, 200 feet, 300 feet.

Q. I will ask you if the tide there has something to do with the landing of the steamers, and so forth, and did you take that into consideration in answering these questions of Mr. Jennings? A. Yes, sir.

Q. Of course, when you go to land a steamer you don't land her at full speed at the wharf, do you?

A. No.

Q. But when you go under slow bell and land, in your judgment, what effect on that would the tides have there around this point?

A. Why, with a steamer around there with anything out where you say to put a wharf would be hard to make a landing.

(Testimony of P. H. Mason.)

Q. Would be hard to make a landing like that?

A. Yes, sir.

Q. What did you consider, Captain, when Mr. Jennings got you to qualify on the proper position of building a wharf? Now, [367] suppose you was going to build a wharf there from what you know of the upland and what you know of the land under water and what you know of the winds and what you know of the currents, where would you consider the most practicable and feasible place of wharfing out from there—about how far? Just go over to that exhibit and state to the Court.

A. This would be corner 3 or 2?

Q. No, there isn't any corner there. You see this is the ground. This is the waterfront.

A. This is the waterfront?

Q. Yes, this is the waterfront. Here is where the cabin is. You see the cabin marked? A. Yes.

Q. And the sandy beach, I think, is marked "sandy beach."

A. Well, I know. I would come out here.

Q. You would come out about where, the word "mean"? A. "Mean."

Q. Is that it? A. Yes.

Q. And which word "mean" is between the word "high" and the prolongation of the easterly—

A. Westerly.

Q. Westerly boundary line of Barron's claim?

A. Yes.

Q. Now, in your—from the knowledge that you have of the winds, tides, waters, soundings, and so

(Testimony of P. H. Mason.)

forth, how far would you extend that wharf out, approximately, Captain, do you think? Mr. Jennings had you out as far as the trap? A. Yes, sir.

Q. Now, let's see how far you would do it and put in a practicable wharf there. [368]

A. I would come out to 20 feet or 22 feet.

Q. Well, west of what point?

Mr. CHENEY.—Let him answer it.

A. Put a mark right here.

Q. (By Mr. WINN.) Put the "X"?

A. "X."

Q. Yes, sir; a cross. Then that is the point about midway between the words "Barron's piles" and the prolongation of the westerly side line—

Mr. BURTON.—End line.

Q. (By Mr. WINN.) Yes; westerly end line of Barron's claim?

A. Yes, sir. Now, I am confining myself here to Mr. Barron's property.

Q. Oh, yes, that is what I am talking about.

A. I am not confining myself to come down here or come out here.

Q. Oh, no; talking about coming out in front of Barron's property, not wharfing out from somebody else's. Now, with a wharf built at this most practical point to reach this property, would this trap of Alexander's and the leadway of his trap obstruct the landing at this wharf or the reaching, in other words, the reaching of Barron's property? A. Yes, sir.

Q. Now, there is one other question, Captain, you have observed the topography of the country, contour

(Testimony of P. H. Mason.)

of the shore, and so forth, I will ask you if you have had any experience in going into this harbor in the night-time?

A. It was night when—the last two—when I was towing there both times was night.

Q. Well, now, Captain, knowing the contour of the shore line there and the topography of the country and the mountains and hills, and so forth, suppose that you were entering [369] there in the night-time with this trap in there the way it is there now, I wish you would explain to the Court what, if in any, way that would be a special obstruction in the way of entering there at night.

A. Well, sometimes in entering that place or any other place, the trap—you will get right onto it before you see it. The shadow of the land somehow or other spoils the view of the trap and I have been frequently right alongside of a trap or dolphin or scows. Knew it was there somewhere, but couldn't see the dolphin at the time being; not only myself but lots of others right on the ships. The boats do it continuously.

Q. Now, you testified for Mr. Cheney, I believe, that you had been in there twice with a tow of logs. Well, now, last year the trap was in there, of Alexander's? A. Yes.

Q. Well, you was only towing for Barron the year before? A. That is—

Q. Last year and this year? A. Yes, sir.

Q. So, the times you seen it was year before last when the trap was not in there? A. Yes, sir.

Q. You didn't try to get in there this last season,

(Testimony of P. H. Mason.)

did you? A. No, sir; I did not.

Q. Yes. Mr. Cheney asked you something about, I think, the possibility of building a wharf or something on the—between the lead of this trap and the prolongation of the east side line—

Mr. BURTON.—End line—

Q. (By Mr. WINN.) —east end line of Survey 804 of this section—[370] the section there. Put a pencil and mark it there. I don't know whether indicates in the record or not. What would you say about the practicability of building a wharf out from that waterfront of Barron's claim which I have just referred to in that question?

A. Well, this part in—this part right here, you have a high bluff and it shelves off down to low-water mark, is all rocky, got all slime or shells, or whatever you may call it, and gradually slopes right down until it comes to low water; but this is high bluff here. To get a wharf there have to start that wharf at the height of that bluff.

Q. I see. Well, how about the winds, the tides or water there, is that a practicable place of entering this property of Barron's on the water? A. No.

Q. Well, now, suppose you built a wharf out there—supposing it could be done from any point on that, would Alexander's trap and his lead line all be in the way of landing at a wharf *built that on that side*?

A. Yes, sir; certainly; have to come up, follow this lead, I think, in fact I know have to follow that lead and then you wouldn't have the distance up here and

(Testimony of P. H. Mason.)

there or have any room for handling a boat.

Q. Now, I will ask you, Mr. or Captain Mason, if you observed where Alexander, the defendant in this case, always moors and anchors his boat and where he kept them while he was fishing out there and his scows or things of that kind. On what part of this ground did he keep them all last summer when fishing?

A. That is one of the things I paid particular attention to.

Q. Yes, sir; just tell the Court. [371]

A. Here off his trap he has one dolphin or mooring pile.

Q. He has one pile or dolphin off near his cabin out— A. Yes, sir.

Q. —here, marked “A” on this exhibit?

A. Yes, sir; but I never saw any scows or anything but the small boat, dory, put there, but here on this corner here, on the northwest corner of this trap that is where I have seen his boat scows and his boat and everything else that he had, the paraphernalia would be tied up in here to the trap.

Q. So, he used the ground then under the water between the trap and the long peninsula?

A. Yes, sir.

Q. Is his general tying-up and mooring ground?

A. That was when I was there.

Q. Yes. I believe that is all.

Recross-examination.

Q. (By Mr. CHENEY.) Captain, I want to ask you a question about the tides Judge Winn asked you about coming in under low bell a harbor of this

(Testimony of P. H. Mason.)

kind if the swiftness of the tides wouldn't be liable to affect a boat running at slow speed, and you said it would. That is right? A. Yes, sir.

Q. Now, I will ask you, Captain, if it isn't a fact that the tides that come in around this point here into this harbor are much swifter and the water is much more swift when you are coming in around there than they are over here after you get over in this part of the survey? A. No, sir; they aren't. [372]

Q. They aren't? A. Just the opposite.

Q. Isn't it a fact that when the tide comes in, the tide comes from Icy Straits when it comes in?

A. No, sir.

Q. Where does it come from?

A. Flood tide comes up Chatham Straits.

Q. Well, when it goes out where does it come?

A. Comes out Chatham Straits.

Q. Comes out this way when going out?

A. Goes to the southward flood tide. Ebb tide comes northward.

Q. Well, the tide—isn't it a fact that when the tide comes around any point like this point marked "bare rock" along any shore that it is swifter the nearer you get to the point the swifter it is—swifter than it is out further into the harbor, no matter what harbor it is?

A. The tide in here between from here, from this place to Funter Bay, the tide is slower than anywhere else.

Q. (By Mr. WINN.) Where is here?

A. When coming by this particular place there is

(Testimony of P. H. Mason.)

no tide in here, in here whatever.

Q. Take in here?

A. At this point here?

Q. Yes. A. Along that.

Q. (By Mr. CHENEY.) I don't think you have—you answered the question about some other part of Chatham Straits? A. All right.

Q. Well, I asked you if it isn't a fact that the tide runs swifter right in around this point here than it does in the other part of the harbor, over here, say, to the eastward [373] of that trap?

A. No, sir; no tide in here whatever.

Q. No tide at all?

A. Not to amount to anything.

Q. There is some tide, isn't there?

A. Very little, because this back current forms an eddy here.

Q. Well, what forms the eddy?

A. The tow of the tide coming up here will throw it back and then it has to go either up or down.

Q. Well, I mean the tide—you say there is some tide in the harbor, isn't there? A. Very little.

Q. Well, when there is some tide in the harbor, I asked you if the tide wouldn't run swifter over there near this point of rock marked "bare rock" than it does over here in front of the eastern portion of Barron's claim? A. No, sir.

Q. All right, that is all.

Mr. WINN.—Is that all?

Mr. JENNINGS.—I just want to ask another question.

(Testimony of P. H. Mason.)

Q. Just sit down. You see these five piles at the extreme left forming the extreme left boundary of what is called Alexander's trap, don't you?

A. Yes, sir.

Q. Five piles. Now, suppose that was a wharf, Mr. Alexander wanted you as captain of the "Georgia" or the "Barron" to deliver him a ton of provisions on that wharf, could you do it?

A. Yes, sir.

Q. Wouldn't have any trouble, would you?

A. May have some trouble, can do it.

Q. You could do it? Wouldn't be any feat at all?
[374] A. I hope not.

Q. Can go in there and dump off a ton of potatoes, or whatever is wanted there, with the "Anna Barron" and get out if that was a wharf instead of a fish-trap?

A. Yes, sir.

Q. All right. Suppose this wharf of Mr. Barron's that he is going to build begins on the beach at the word—at where the word "low" is there on the beach, and runs right out to that fish-trap, couldn't the "Barron" do this same thing?

A. Why, yes, if the trap wasn't there.

Q. What would the trap have to do with it?

A. Then there would be no trap there.

Q. You said you could do it there if those five piles were a wharf instead of a trap?

A. With these five piles you can't make a wharf.

Q. I am talking about the end of the wharf. If that trap was a wharf instead of a trap you can do it?

A. Yes, sir; the trap would be away.

(Testimony of P. H. Mason.)

Q. What? A. The trap would be away.

Q. But the wharf would be there, wouldn't it?

A. Guess so.

Q. Now, what is the matter, what is to prevent Mr. Barron from running his wharf from the word marked "low" out to that trap and use that there for the face of his wharf right next to the face of that trap? What is to prevent that?

A. Would any man allow any wharf to be facing his trap?

Q. What?

A. Would any man allow any wharf to be facing his trap?

Q. You know, Captain, Mr. Barron isn't suing for an injunction— [375] I mean we are not suing Mr. Barron for an injunction. He is suing us. We are not talking about whether a wharf would interfere with the trap. We are talking about whether the trap would interfere with the wharf, and maybe a person who owns a trap wouldn't be willing to let a wharf go out there because spoil his fish-trap, but that isn't the question. You answer the question I asked.

A. If they built a wharf from Mr. Barron's property out to the fish-trap, the heart or spiller, whether the "Anna Barron" could land there, is that the question?

Q. Yes, sir. A. She could land there.

Q. She could land there? A. Yes.

Q. And discharge her freight? A. Yes, sir.

Q. And get out? A. Yes, sir.

Q. Without trouble. All right.

(Testimony of P. H. Mason.)

Re-redirect Examination.

Q. (By Mr. WINN.) Now, as I understand you to say, Captain, no one with any common sense would build a wharf out there in that swift water there, swirling boil of waters? A. No.

Mr. CHENEY.—He said there isn't any tide there next to that point.

Q. (By Mr. WINN.) Now, Captain, did you tell Mr. Cheney there isn't any tide down here next to this reef? A. No, I did not. [376]

Q. You told him that back inside there wasn't any tide? A. That is what I did.

Q. Now, then, explain to the Court why it would not be practicable or common sense to build a wharf clear out here to the end of this bare rock or this reef to have a landing place?

A. Well, in the first place, be more sea, be more tide, and you have both more wind from the north-east and the southwest to contend with.

Mr. WINN.—That is all.

Re-recross-examination.

Q. (By Mr. JENNINGS.) And the water would be too deep? A. No; not too deep.

Q. About sixty feet of water there?

A. Not at the end of the trap.

Q. Pretty nearly sixty feet?

A. No, sir. What do you call pretty nearly?

Q. Well, there is fifty feet? A. Yes.

Q. (By the COURT.) Now, Captain, I would like you to tell me all the reasons you know against the feasibility of the construction of a wharf from the

(Testimony of P. H. Mason.)

end—from the easterly end of this survey out to deep water?

A. Well, simply, your Honor, just as I have stated before. You have an abrupt bluff that makes up high, it shelves down as far as I have seen below water, nothing but rocks to the low-water mark. Now, what is beyond that we have found hard bottom, and I don't know whether there is rocks or not. Sometimes you can put a pile on and drive it, it [377] will go down a foot and strike hard bottom and then you can get it no further; but this place here as have just represented, that is certainly an abrupt bluff, and it is almost impossible at high water to walk past this place unless get up on the timber land.

Q. Now, I have asked you, Captain, to state all the reasons—I want all the reasons without putting any suggestions to you against the feasibility of the construction of a wharf at any point beyond the lead line of the defendant and the prolongation of the easterly end line of plaintiff's?

A. I think I have stated my reasons for not building a wharf there.

Q. And those are the only reasons you know of?

A. Yes, sir.

Q. And those are the only reasons you know of against the feasibility of a wharf at that place?

A. Well, it is not—a wharf built there certainly wouldn't be as secure there for safety as one here.

Q. Well, now, I want you to get all of the reasons.

Mr. WINN.—The Court wants all of the reasons.

A. For the first place, there is a good tide here and

(Testimony of P. H. Mason.)

in the second place, I think, with a southeast wind we have the longer reach to draw, and here maybe 500 feet from this place the wind does not have the effect that it would here.

Q. (By the COURT.) Now, Captain, didn't I understand you to say in response to Mr. Cheney's question that particularly when the southeast wind was blowing that would prevent a landing place easterly of defendant's lead line?

A. I did. I stick to that yet, if I had to go in there.

Q. Well, now, isn't it true that you are better protected from any other wind in that harbor than the southeasterly or the [378] south wind, isn't that true?

A. Well, with my experience there, Judge, the southeast wind does not draw up this coast easterly, from the southeast coast in on the land.

Q. What direction do they blow?

A. It goes more to the eastward off the land, but if you get a half mile or a mile into Chatham Straits you will find the wind there of much more velocity and coming straight up from the southeast.

Q. Well, then, why do you say that would prevent a landing place at the point you have marked here east of the defendant's lead?

A. Now, I should prefer to drop my anchor here and if the wind increased I would have much more room to give her rope to extend out towards this shore.

Q. If that is the case then, Captain, why wouldn't

(Testimony of P. H. Mason.)

it be better to have your wharf so extended to have the face of it somewhere here, somewhere in the vicinity of the point you have marked east or easterly of defendant's line?

A. Well, I think that it would cost a good deal more to put a wharf from here, than it would from here.

Q. That is, I want to know just the reason, would it be because cost more to construct your wharf. While you are here as an expert and I want the definite information. I have got to make a finding and I want to ascertain just the reasons against the feasibility of the construction of a wharf from the easterly shore line of this claim to deep water?

A. Well, I don't think a wharf can be constructed here with any safety from this bluff out to the westward. I think it is impracticable, but it is practicable to build a wharf from here out here. [379]

Q. Now, why is it impracticable to build a wharf?

A. Well, from what I have seen and what I know of the rocks on the shore.

Q. Well, now, that is the only reason, Captain?

A. Yes, sir.

Q. So far as the land out there, and if you had a wharf built there, so far as the bottom of the land at the face of the wharf it would be just as good a place to land as any other place in the harbor?

A. No.

Q. It wouldn't be?

A. No, sir, the further you get this way the more you have to contend with the wind from the north-west and west.

(Testimony of P. H. Mason.)

Q. Now, Captain, I want to understand your testimony, if I can, but I understood you to say in response to Mr. Cheney's question that this point you have marked easterly of defendant's lead was the most feasible place to anchor a boat when the southerly or southeasterly winds were prevailing?

A. I would put the bow of the boat up here and the anchor would be here and the boat would be here.

Q. The anchor of the boat would be—

A. Would be here.

Q. At that point, Captain, and the boat would be here? A. In here somewhere.

Q. Now, make a mark, just where exactly you want it?

A. Well, say with a southerly wind, have an anchor 800 pounds, have a coil of rope 125 fathoms and if come in there with a southerly wind, I would certainly give her 75 fathoms and 75 fathoms from that and up to this, about 400 feet, hain't it?

Mr. CHENEY.—450 feet. [380]

A. 450 feet. That would anyhow bring your boat in here somewhere. You would have to have that much room to swing.

Q. (By the COURT.) I think I understand you, but there is one more question, Captain, what wind,—winds are the greatest menace to this harbor?

A. The greatest winds in my estimation would be a southwest and a west wind.

Q. Yes.

A. But I want to state further that in two years' experience I have never seen a west wind strike ever

(Testimony of P. H. Mason.)

on that shore in that bight. I don't say it don't do it, but I have never seen it.

Q. The harbor, as I understand you, is well protected from northerly and easterly winds?

A. Yes, sir.

COURT.—That is all.

Mr. WINN.—That is all, Captain.

COURT.—Will be in recess until half-past one.

[381]

One-thirty P. M., same day.

P. H. MASON, heretofore duly sworn, being recalled, testified further on behalf of plaintiff:

Cross-examination.

Q. (By Mr. CHENEY.) Captain, you are more or less familiar with the shore between high and low tide in front of this survey 804-B, are you?

A. I don't understand the question.

Q. I say you are more or less familiar with the shore that is between high and low tide in front of this survey 804-B you have been testifying about?

A. Yes, sir.

Q. Now, in regard to the building of a wharf at the place where you told the Court was the most feasible, extending, as I understand it, in a southerly direction from the *out out* to where it is designated on the map, towards the Alexander trap, about midway between the reef and the lead line of his trap. I will ask you if you know whether that is good driving ground over the shore between high and low water?

A. So far as the lead goes it indicates very fair ground.

(Testimony of P. H. Mason.)

Q. Oh, well, but I say between the line of ordinary high tide and the line of ordinary low tide?

A. You are not asking about the water?

Q. Not asking about under the water. Just about the shore? A. Yes, sir, fairly.

Q. You think that it would be possible to drive piles on that ground?

A. I don't think any doubt of driving them, but wouldn't be necessary to put that piling down very low between high water and low water mark. [382]

Q. Put them down low into the—

A. Put them deep in the ground.

Q. But do you know whether they could be driven there on that space you have mentioned to the Court as most feasible or whether that is bedrock?

A. No, I couldn't say there is bedrock below, that is possible, but whether could drive the piles I can't see far enough to be safe.

Q. Of course, if going to build a wharf there you wouldn't build it right from the line of ordinary high tide? You would have to go upon the land enough distance so to build your wharf? A. Yes, sir.

Q. Well, I am speaking now of the ground, condition of the ground between ordinary high tide and ordinary low water. A. Yes, sir.

Q. You think you could drive piles there?

A. I do.

Mr. CHENEY.—That is all.

COURT.—Anything further, Judge Winn?

(Testimony of P. H. Mason.)

Redirect Examination.

Q. (By Mr. WINN.) Well, in the building of a wharf even if piles couldn't be driven there, it is very easy on the beach between low and high tide to set them on mud sills or put them on rocks, is it, and place them? A. Yes, sir; can be done.

Mr. WINN.—That is all, Captain.

Mr. CHENEY.—That is all.

COURT.—That is all.

Mr. WINN.—Captain Thornton. [383]

[Testimony of E. Thornton, for Plaintiff.]

E. THORNTON, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Captain, how long have you lived in Alaska?

A. About twenty-five years, I believe.

Q. How many? A. Twenty-five.

Q. Twenty-five years. And have you followed steamboating a good deal since you have been here in southeastern Alaska?

A. Yes, sir; nearly all the time.

Q. You have served in the capacity of almost everything up to master, haven't you, Captain?

A. Yes, sir.

Q. And for the last few years what position have you been occupying on any of the steamers plying on the waters of southeastern Alaska?

A. Well, the last seven years master of the "Georgia."

(Testimony of E. Thornton.)

Q. Steamer "Georgia." Well, what route does the steamer "Georgia" run and has she run for these past seven years?

A. From Juneau to Skagway and from Juneau to Sitka.

Q. Now, *whether* on your run between Juneau and Sitka have you ever been necessitated to call in at the cannery of Mr. Barron's at Funter Bay?

A. This is a postoffice. Compelled to go there.

Q. It is a postoffice and one of your regular calls there? A. Yes, sir.

Q. Well, how long has that been one of your regular calls, Captain?

A. Ever since the boat has been on the run.

Q. Now—in going from Juneau to Sitka, by the way of Funter [384] Bay, did you ever go up and down the westerly coast of Admiralty Island?

A. Yes, sir; you mean below Funter Bay?

Q. Yes, sir; below Funter Bay. A. Yes, sir.

Q. Below Funter Bay. Now, you have heard considerable testimony and evidence in this case, Captain, about the ground that is embraced in survey 804 and about this little cove or harbor in there. You have heard Captain Mason testify and several others. You have been in the courtroom?

A. Yes, sir; yes, sir.

Q. Now, I will ask you in going on this route between Skagway and Sitka if you have taken any particular notice of this little harbor or cove just in front of this land of Mr. Barron's?

A. Yes, sir; I have.

(Testimony of E. Thornton.)

Q. When did you first become acquainted with that spot, Captain?

A. The first time a good many years ago I took a party of—took a party there that was going back into the mountains to examine a mine or prospect, landed them several times in fact.

Q. I see. Have you been in there several times?

A. Yes, sir.

Q. Now, I will ask you, Captain, if you in your trips between Juneau and Sitka and going up and down this shore of Admiralty Island on which this survey 804 is located, if you have ever taken any notice of the winds and especially the northerly or the easterly winds as they blow up and down this shore?

A. I have, especially the northeast.

Q. Especially the northeast wind. Now, I will ask you in [385] leaving Funter Bay and going down towards Hawk Inlet if there is a strong northerly wind blowing, do you find the same stress of wind all the way between those two points? If not, explain to the Court.

Mr. CHENEY.—Just a moment, Captain. We object to this, of course, your Honor, because we claim it is immaterial to try out whether that is a good harbor or not is immaterial.

COURT.—He may answer. I don't know just the extent of the materiality at this time.

WITNESS.—What do you want?

Q. (By Mr. WINN.) I asked you if you ever noticed the northerly winds in traveling up and down the shore of Admiralty Island when they were blow-

(Testimony of E. Thornton.)

ing as to whether or not you had found the same stress of wind all the way from Funter Bay down to Hawk Inlet? A. It decreases.

Q. It increases to what? A. It decreases, I said.

Q. Oh, it decreases? A. Yes, sir.

Q. The northerly wind as you go down from Funter Bay toward Hawk Inlet decreases?

A. Yes, sir.

Q. Now, suppose you leave Hawk Inlet and was coming up along this shore with a tow where between Hawk Inlet and Funter Bay would you be apt to strike the stiffest breeze?

A. You would strike the stiffest breeze beyond—beyond that little bight that you have described.

Q. That is I have described—

A. To the northward of it.

Q. That is when going up you would strike the stiffest part [386] of the breeze as you pass that little peninsula-like that comes out there near Barron's survey? A. Yes, sir.

Q. Now, when were you in this place last, Captain?

A. I don't remember whether it was the 10th of this month.

Q. The 10th of this month? A. Yes, sir.

Q. Were you out there at the time "Lloyd Hill" went out? A. Yes, sir.

Q. At whose instigation, Captain, did you go out there on the 10th or 11th of March?

A. I was asked by Mr. Barron to go down there and take a look and see what I thought of conditions down there in regard to the entrance.

(Testimony of E. Thornton.)

Q. In regard to getting from deep water to his upland? A. Yes, sir.

Q. Now, this is an exhibit "D," which Mr. Hill has drawn and has been offered in evidence in this case, I will refer you to that, Captain, and ask you if—if you observed upon the ground out there at this date any piles or piling in front of this survey of Mr. Barron's? A. Yes, sir; I saw the trap, fish-trap.

Q. How did the trap appear upon the ground as compared with the drawing which Mr. Hill has made on this exhibit "D"? A. Appears the same.

Q. Did you do any sounding out there at that date, Captain? A. No, sir.

Q. You didn't do any soundings at all. Was it at this time on the 10th, the first time you had seen this trap that Alexander put in there?

A. Yes, sir. This is the first time I had noticed it particularly. [387]

Q. This was the first time you had noticed it particularly? A. Yes, sir.

Q. Now, while you was there you noticed the contour of the shore and the hills, and so forth, on the adjoining upland and took in a general—just a general view of the surroundings, did you not, Captain?

A. Yes, sir.

Q. Well, now, I will ask you, Captain, as to whether or not in your judgment that this trap the way it was built and constructed out—you was out there on the 10th or 11th—and further taking into consideration if they had a cable strung from the last pile nearest the shore on to—attached to some-

(Testimony of E. Thornton.)

thing beyond the line of ordinary high tide or say between the line of ordinary high tide and the low tide, would that fact that the cable or web strung on that and then with the trap constructed the way it was when you were out there on the 10th or 11th of this month, as to whether or not that obstructs the ingress and egress to and from Barron's upland?

A. Closes it, in my estimation.

Q. Closes it in your estimation. Now, I wish you would explain to the Court somewhat why that this would cut off the access to Barron's land.

A. Well, I wouldn't be able to go in to an anchorage.

Q. Now, I will ask you from what you know of that land in there and the surroundings as to whether you consider the proper place and sensible, feasible place for going in and out to Barron's land from Chatham Straits with any size of steamers or gasoline boats, just indicate on this plat to the Court?

A. Will you ask that again? [388]

Q. Well, just from—I withdraw the question. Knowing the little harbor as you do and Barron's upland, to indicate on this map—and the fish-trap and having been in there and as a navigating man, I want you to state to the Court what is the proper and feasible and sensible way of ingress and egress to and from Barron's upland to deep water?

Mr. CHENEY.—Now, just a moment. I would like to know whether you are confining this question to your prolonged lines here within these lines, or are you asking it without reference to these lines

(Testimony of E. Thornton.)

or not; coming in this direction, or this direction, or any direction to this survey?

Mr. WINN.—Well, I have the question there, your Honor.

Mr. CHENEY.—I will have to cross-examine him on it.

COURT.—He may answer the question, if the Captain understands it.

A. If I was coming from the south, come in about here.

Q. (By Mr. WINN.) Well, now, come in about where you would strike the trap? A. Yes, sir.

Q. About at the point called "Barron's piles," that is if coming in from the south?

A. Yes, sir. If I was coming in from the north I would circle around and probably come in about the same place.

Q. You have anchored vessels in there, haven't you, Captain? A. Yes, sir.

Q. Where did you find the best place for anchoring a vessel?

A. That I can't answer, been so long ago.

Q. I see. You didn't take any soundings when you was over there this last time in that regard?

A. No, sir.

Q. And you didn't take any depth of water? [339] A. No, sir.

Q. I see. Now, your explanation of getting in and out to the harbor is given not accurately—the condition of the bottom underneath the water, but

(Testimony of E. Thornton.)

it is based upon what, Captain?

A. Upon the general appearances of the surroundings and of the land.

Q. Yes. Just a minute. I will ask you, Captain, from what winds is that place in front of Barron's property there protected?

A. Well, I know it is protected from the northerly winds and there has been some talk about other winds, the east and the west and the northwest and the northeast, but it has been my—according to my observation it is a protection from the east to the west winds. They all draw down the channel.

Q. That is, it is protected from the east to the—what did you say?

A. The east to the west. I have noticed all those winds. No matter what they are, no matter what they call them, there is just two character of winds: one that draws up the channel; and one that draws down.

Q. What would you say about the practicability of a steamer like the "Anna Barron"—you have seen her, haven't you? A. Yes, sir.

Q. Going into this place to anchor, provided she had a tow of something and was endeavoring to reach the upland of Barron's property, say she had a tow of lumber, or anything of that kind, what would you say as to whether or not she could get into safe anchorage? What have you got to say about that? [390]

A. Well, there is no anchorage there for her with that trap in the way.

(Testimony of E. Thornton.)

Q. Captain, have you had any experience in going into places somewhat like the surroundings of this place at even-tide or night and had occasion to observe as to whether or not you could see a fish-trap any distance off?

A. I have that experience every trip to Sitka.

Q. Yes, sir. Well, what would you say from the surrounding country here and the way this fish-trap is located about the question as to whether or not when you would be going in there, say it isn't a moonlight night, but just an ordinary night, as to whether or not you could see this trap for any distance off?

A. Couldn't see it at all; not at some distance; you couldn't see that trap for ten feet, I don't believe.

Q. Is that one of the matters also that you take into consideration about this trap shutting off the right of way up to Barron's land?

A. No, sir; I think that trap is in the way even in the daylight.

Q. In daylight? A. Yes, sir.

Q. But I mean you do take into consideration the—the inability to see an object of that kind with all the other circumstances in stating that it does cut off access to this land? A. Yes, sir.

Q. You take all those into consideration?

A. Yes, sir.

Mr. WINN.—You may cross-examine, Mr. Cheney. [391]

(Testimony of E. Thornton.)

Cross-examination.

Q. (By Mr. CHENEY.) I understand you to say, Captain, that you haven't made any soundings out here in front of this survey? A. No, sir.

Q. You haven't tested the bottom in here to the eastward of the trap? A. No, sir.

Q. Or to the westward of the trap? A. No, sir.

Q. And during all your trips to Sitka for the last year we will say since this trap was built a year ago you never noticed the trap until the other day when you went out?

A. No, sir; will you allow me to explain?

Q. Yes, sir.

A. My regular route is not past that trap, but if you will show me that other chart I will show you how and why I have seen it. Why and why I am acquainted with the conditions down there in northerly weather.

Q. But I want to find out just what you testified to. I understood you to say that when you was out there the 10th of this month was the first time you had seen the trap? A. Yes, sir.

Q. Then, the route that you take in going to Sitka is too far away to observe the trap?

A. I don't go that way on my regular way to Sitka eastward. If you would allow me to explain, I would tell you.

Q. Which chart do you want? This one?

A. Yes, sir.

COURT.—Explain if you wish to, Captain.

A. Well, I just want to clear up the reason why

(Testimony of E. Thornton.)

in coming out [392] of—I am compelled to enter Funter Bay to deliver the mail there. If have northerly winds with a heavy sea, I don't ever cross the channel in the trough of the sea. For that reason and for years I have been running down here in very heavy northerly weather and by that means I get a little angle and get the sea on the starboard bow and make better weather of it and run up here, where ordinarily I would come down here. I have been in the habit of going down there for years to escape crossing the channel in the trough of the sea.

Q. (By Mr. CHENEY.) But still although you have gone that way you have never seen this trap until the 10th?

A. I haven't been down here for a year. I was asked last year. Last summer—this last winter there has really been no weather this season that required running down there that I know of. I haven't been down there. I don't think the vessel has been down there this year, and previous years I have been there at that just when the weather forced me I have been going down that way and crossing in that way.

Q. Since that trap was built you wouldn't have had occasion?

A. I don't know when it was built.

Q. Built a year ago.

A. I haven't been down there since a year ago; no, sir.

Q. Now, when you stated in answer to Judge Winn's question that it would be impossible for the

(Testimony of E. Thornton.)

—for you to run in there, that you wouldn't have any anchorage if you were going to reach the upland, where are you answering that—with reference to these side lines that are prolonged in front of his survey? A. No, sir.

Q. You are not? [393] A. No, sir.

Q. You say you haven't made soundings in this water at all? A. No, sir.

Q. Well, then, I will ask you, Captain, supposing that you had a load of—a load of passengers, we will say prospectors that were going to examine a prospect over there and they wanted—they had some provisions and they wanted to land it anywhere on this low beach over on the east end of this claim over here— A. Yes.

Q. —near that point and you were coming in for that purpose to lower a small boat and land your passengers and what freight they had, do you mean to say, do you mean to tell the Court it wouldn't be possible for you to come in here from Chatham Straits and land with her within a reasonable distance and lower a small boat and deposit your men and provisions there?

A. In what kind of weather?

Q. Well, we will say in good weather?

A. Oh, I could stand off for that matter and not drop an anchor; send my boat ashore without dropping any anchor, stand off in the channel.

Q. And you could land your passengers and also what freight they had in a small boat?

A. If the weather was calm I could send my boat

(Testimony of E. Thornton.)

ashore without anchoring.

Q. Well, now, Captain, if there was a heavy southeaster blowing? A. Yes.

Q. A heavy southeaster. Now mind you, you wouldn't think of going in there anywhere else along in there and anchoring in a southeaster? [394]

A. With that trap there?

Q. Or without it there.

A. If there was a heavy southeaster blowing—I don't know all the conditions of that place in a heavy southeaster; that I couldn't answer definitely.

Q. But you don't claim it is a protected harbor for a southeaster? A. Well, I say I don't know.

Q. You wouldn't want to offer an opinion on that?

A. No, sir; I don't; not having seen the place in a heavy southeaster I couldn't say.

Q. Then, not having seen this bottom in here, Captain, in front of the east half of survey 804, of course, you can't swear now to the Court that you couldn't anchor in that ground there?

A. I couldn't say I could or I couldn't say I would. I couldn't say either one.

Q. East of the trap. You wouldn't say you could or you wouldn't say you couldn't, do you?

A. No, sir.

Q. That isn't in your opinion, Captain, a good harbor, is it?

A. I consider it a fair harbor in any wind that blows down Chatham Straits.

Q. Northerly wind would you call it a good harbor?

(Testimony of E. Thornton.)

A. Either easterly, or as I said before any winds that draw down Chatham Straits I consider it a good harbor.

Q. Well, in the summer time, Captain, during the fishing season, say in June, July, and August, what are the prevailing winds over in Chatham Straits?

A. Southeasterly, I believe.

Q. Southeasterly winds? A. Yes. [395]

Q. And the northerly winds when do they generally occur—winter months?

A. Well, they generally start in, I believe, as far as I can remember, in September.

Q. Well, when, if you know, is the usual time for the southeasters, or is there any time?

A. Well, there is.

Q. They are liable to come any time?

A. There is no rule for that; no, that blows at any old time; is never calm.

COURT.—Any further cross-examination?

Mr. JENNINGS.—Only to put one question.

Q. Captain, I put this pointer on the word “low,” which is supposed to be on the beach there at low tide—I say the line of low tide, see that?

A. Yes, sir.

Q. Now, if a wharf were built from the point “low” and out to that place where I now have the pointer, which is Alexander’s trap, the—

COURT.—The southeasterly.

Q. (By Mr. JENNINGS.) —the southeasterly portion of Alexander’s trap, would the “Georgia” or any other boat have any trouble in going up there

(Testimony of E. Thornton.)

and discharging freight and passengers on this wharf? A. Here.

Q. All right.

A. If the wharf—if the wharf—if this part of the trap takes the place of the wharf, is that what you mean?

Q. Well, yes. If the southeasterly, the southeasterly quadrangle of that trap now was a wharf instead of a fish-trap and the approach to the wharf ran on from that on back to [396] what—what is marked “low” there, that way, would there be any trouble of the “Georgia” landing its freight and landing passengers? A. Right here, you mean?

Q. Yes.

A. Any vessel could come—a vessel could come here if this quadrangle was, you say a dock?

Q. Instead of a trap.

A. Instead of a trap. Why, in fair, ordinary—ordinary weather a vessel could discharge there.

Q. There would be nothing in this—nothing to make it any harder to discharge there than there is at the Haines wharf, at the Haines wharf or any other wharf in southeastern Alaska, would there?

A. No; I see no reason if this quadrangle was a wharf. I see no reason why a vessel couldn't discharge there.

Q. And if that southeasterly quadrangle there now were here just remove the quadrangle towards the west a little farther out toward the west be just the same? A. This side?

Q. No, toward the west; this is the west?

(Testimony of E. Thornton.)

A. About how far?

Q. Well, we will say to the point that is marked 37 feet.

A. No; I see no reason why a vessel couldn't come in there and discharge.

Q. Wouldn't have to anchor. Just get up to the wharf, of course?

A. Of course, a vessel—a wharf being out this far, but more or less of a swell. That wouldn't be protected as much as a wharf in here. [397]

Q. Yes, that is true.

A. You understand that.

Q. But in the business of steamboating up here have to land at all kinds of places. Don't get stone piers to land at. Don't have them up here. You have made many a landing with the "Georgia" at places a good deal worse than that, haven't you, Captain?

A. Well, that I couldn't say. That is only supposition.

Q. Tell me now what would make that any worse than any other wharf to land at?

A. Nothing, as I said before, if this quadrangle was—

Q. A wharf.

A. —the square was—was a dock, I could come in there and discharge and even if it was here.

Q. And even if it was at the point 37?

A. Yes.

Q. That is all.

Mr. WINN.—Is that all the questions?

(Testimony of E. Thornton.)

Mr. JENNINGS.—That is all.

Redirect Examination.

Q. (By Mr. WINN.) Now, Captain, from what you saw of that and know of this little cove out there in front of Barron's property would it, in your judgment, be possible to maintain a wharf in there so that you could have ingress and egress to and from that wharf to the upland of Barron's with this fish-trap there constructed the way it is?

A. No, sir; I certainly wouldn't take a vessel inside of that fish-trap.

Q. Now, I wish you would explain to the Court, Captain, why you wouldn't? Mr. Jennings and Mr. Cheney didn't ask you, [398] and I will ask you to explain it.

A. There is not room to handle a vessel. Can go in here, but she never could turn around. Now, they have got these soundings around in here and to look at it, a person—and the measurements they have made, a person would think that you have all of that swinging room for a vessel to turn in, but you haven't. You have got to take a—you have got to take a certain amount for safety. You are only judging by the eye. There is no—there is no visible line to mark your danger line around here. You have only got to judge that, and you have got to judge that on your way, and you have got to contract the distance to be safe, and you haven't got room to turn, when you do that. When you go in here, you have got to get out. You have got to make a half circle to do it. They have talked of it, but I think any person who has

(Testimony of E. Thornton.)

been on a vessel any time knows you haven't got control of the vessel when she backs.

Q. Well, suppose, Captain, now, just look at this map you were testifying to then, consider if this line between this trap and the peninsula,—now suppose you were confined to that distance, to the prolongation of the westerly end line of the survey and the line made by the trap and the lead and confine yourself just to that space in there, would it be better or worse than you have described?

A. I can't. That is on to that, Judge?

Q. Well, I supposed when you was answering my question a while ago you was taking into consideration, you was using all this space.

A. I was using all this space. I wasn't taking into consideration any arbitrary lines here at all.

Q. But if you did take into consideration the lead of the trap [399] and the prolongation of the westerly end line of the claim and only considered that space in there, make it worse or better?

A. Make it worse, of course.

Q. Well, now, Captain, what about this—this space over on the other side of the trap, on the right hand of the—of the harbor as you go in and on the right hand side of the trap as you go in, what, if anything, do you know about that?

A. I know nothing about it, Judge.

Q. In there. Well, now, what—what, in your judgment, from what you know of the harbor there, is the best part of the harbor to go in to reach Barron's property? Would it be to go in over the pot?

(Testimony of E. Thornton.)

A. I would go right through that trap.

Q. Right through the trap. So, I didn't ask you what direction, Captain, did you—did you—just withdraw that—were you out there the day Mr. Hill was out there making these soundings?

A. No, sir.

Q. Well, now, Captain, you have a tide-book there, showing the method of securing approximately about average tides and mean tides, and so forth. Now, I will ask you if on the 11th of March, last, if Mr. Hill and the other parties who measured the depth of the water at the last pile in the lead nearest the shore to be eight feet at low tide on the 11th of March. Now, I will ask you as to whether or not at any other season there would be a lower tide than on the 11th of March?

A. Yes, sir; at extreme tides there that would be about 7 feet plus these soundings less. [400]

Q. Less there. That would throw it—that would throw the depth of the water at that last pile if it is now eight feet—

A. Throw it less than one foot.

Q. Yes, less than one foot. Did you ever take any notice, Captain, of the tides, the way they are around this peninsula? A. No, sir.

Q. You didn't take any particular notice of the tides there?

A. No, sir; I know nothing about the currents there at all.

Mr. WINN.—That is all.

(Testimony of E. Thornton.)

Recross-examination.

Q. (By Mr. CHENEY.) Captain, you don't agree with Captain Mason and Mr. Lloyd Hill then as to the depth of the water at that last lead pile?

A. I don't know.

Q. They both testified there would be at least two feet of water at extreme low tide.

A. I took the soundings there, eight feet.

Q. Just going by these figures Judge Winn stated to you?

A. And I know—I know that the extreme tides was seven feet—plus less than the soundings of that day.

Q. And if that eight feet was measured there an hour before low tide that would make some difference, wouldn't it? A. Yes, sir; a very little.

Q. Instead of being measured at low tide, as Judge Winn stated, it was measured an hour before the tide was low?

A. The time he measured within less than an hour I don't suppose make over six inches difference.

Q. You think then if that measurement is right that Captain Mason is not correct when he states that at extreme low [401] tides, speaking of June tides, there would still be two feet of water?

Mr. WINN.—Now, wait, Captain Mason didn't answer the question that way.

COURT.—Doesn't make any difference whether he did or not.

Mr. CHENEY.—I withdraw the question. That is all.

(Testimony of E. Thornton.)

Q. (By Mr. JENNINGS.) Captain, just one question. Do you often run up on pile-drivers without knowing it? You wouldn't do it if there was a light on a pile-driver, would you? A. No, sir.

Q. See a light there, know something was there?

A. If there was a light there, certainly.

Q. If it was an obstruction to navigation there is a regulation of the Treasury Department requires lights to be placed on all obstructions?

A. Well, possibly. I don't remember seeing that. I know there is.

Q. You know that is the custom?

A. It is the custom; yes.

Mr. JENNINGS.—That is all.

Re-redirect Examination.

Q. (By Mr. WINN.) If this trap out where it is located, Captain, is not generally an obstruction to Chatham Straits, only obstructs navigation when you want to go into the upland, that is all?

A. Yes, sir.

Q. (By Mr. JENNINGS.) That is the only time when you run upon that trap?

A. When seeking a harbor. [402]

Q. Going into that harbor?

A. Certainly; no obstruction at all going up and down Chatham Straits, but in going into the harbor it is.

Mr. JENNINGS.—That is all.

COURT.—That is all, Captain. Call your next witness, gentlemen.

Mr. WINN.—Mr. Carlson. [403]

[Testimony of Charles Carlson, for Plaintiff.]

CHARLES CARLSON, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) What business are you engaged in?

A. Pilot of the steamer "Georgia."

Q. Pilot of the steamer "Georgia." How long have you been around the waters of southeastern Alaska on steamers, Mr. Carlson?

A. For the last twelve years.

Q. For the last twelve years? A. Yes.

Q. You have been on a good many steamers as pilot and otherwise, have you? A. Yes, sir.

Q. And when Captain Thornton is laid off here you have taken charge of the "Georgia" on her trips to Sitka? A. Yes, sir.

Q. Skagway, and so on. Now, you are with Captain Thornton on the "Georgia" now?

A. Yes, sir.

Q. Now, in this trip between Juneau and Sitka made by the "Georgia," has been made for several years last past, over what length of time have you been on the "Georgia" while she has been running on that trip?

A. I have been on her a little over five years.

Q. You have heard the testimony of Captain Thornton and the rest of these witnesses about this little cove on—on the westerly side of Admiralty Island just below Funter Bay? You have been along that coast, have you, Mr. Carlson? [404]

(Testimony of Charles Carlson.)

A. Yes, sir.

Q. How many times were you ever in that little place in front of this land that is claimed by Mr. Barron? A. Only been there once.

Q. Only there once?

A. I have been by there lots of times.

Q. You have never been in there but once?

A. Only stopped there once.

Q. You noticed the place in passing up and down the shore there at times but never been in?

A. Yes, sir.

Q. Now, when was it you went over there, Mr. Carlson? A. The 10th of March.

Q. The 10th of March you went over there at the request of Mr. Barron and went over with Captain Thornton? A. Yes, sir.

Q. You examined as to the effect, in your judgment, this fish-trap of Alexander's had in getting on to Barron's land from that harbor? A. Yes, sir.

Q. Well, now, you was out there at this date and saw the way the trap was constructed, did you, Mr. Carlson? A. Yes, sir.

Q. Well, now, taking into consideration the way it was constructed at that time, Mr. Carlson, and your observations and the surroundings there in the harbor, I will ask you if that trap would be an obstruction in the way of entering into the land of Barron's just above there from the deep water of Chatham Straits? Would it be an obstruction in the way of free ingress or free egress to and from the water of Chatham Straits to Barron's piece of land

(Testimony of Charles Carlson.)

on which the [405] cabin is on?

A. For a steamboat, it would, sure.

Q. A steamboat of what size?

A. Well, take a boat the size of the "Anna Barron" or the steamer "Georgia" would be in the way because you get in there you couldn't turn around.

Q. You went out especially for the purpose to observe the way that trap was built, and so on?

A. Yes, sir.

Mr. WINN.—You may cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Carlson, if you were going to land some passengers and some provisions, we will say some prospectors that wanted to get off there on that beach and they wanted to land in here, on this east end of this claim, and you were going to land them there, would there be any difficulty in running the "Georgia" up here if fair weather and coming out at anchor and putting the people out with their provisions on the east end of that claim? A. I guess all right.

COURT.—You haven't designated the place.

Mr. CHENEY.—I said in front of the east end of the claim.

Q. What would you say, Mr. Carlson?

A. I guess that would be all right. All depend upon how far they wanted their stuff. Of course, if wanted it up in the bight.

Q. That would be different if they wanted it over here? A. Yes.

Q. Now, isn't it a fact, Mr. Carlson, that you have

(Testimony of Charles Carlson.)

answered Judge Winn's questions with the idea in mind of the inquiry [406] that if wants to come up here to what they call this sandy beach there, towards the west end of this survey? A. Yes, sir.

Q. That is what you had in mind when you answered the question?

A. Well, I expect that was right.

Q. Yes; but leaving that aside for the present, now, I am just asking you about the east side of the claim. Suppose you wanted to come in there. You say you don't know any reason why couldn't come in and land the passengers there and send them ashore?

A. Couldn't go very close to the shore because the day we was out showed a reef sticking out there—may be several.

Q. You wouldn't want to run up on the beach against this? A. Lay off a long way.

Q. You would want to lay off her where the water was deep? A. Yes.

Q. Out here near the—say, somewhere midway between the extension of this lead line of Alexander's trap and this X that Captain Mason put out on here, he said it was deep water? A. Yes.

Q. You don't know of anything to prevent you from doing that? A. No.

Q. You say you went out there to observe this survey, Mr. Carlson? A. Yes, sir.

Q. Well, do you know whether it is true as Captain Mason says that on the east end of this claim here there is a high bluff running within a few feet of the east line of this claim? Whether that is a

(Testimony of Charles Carlson.)

high bluff running on towards there?

A. Well, there is a bluff all right; pretty steep, I don't know—I didn't take notice exactly how close it was to the line but it is pretty close anyway. [407]

Q. Didn't take any particular notice of it while you was out there? A. No, sir.

Q. Would you say that bluff—that goes to ordinary high tide or is it quite a ways between?

A. That is what, if I remember right, it comes down to high tide.

Q. Well, now, as a matter of fact, Mr. Carlson, you didn't—you didn't go and locate this claim and determine this corner, corner number 3 of that survey?

A. No; but I could see the sign they had.

Q. Where? A. On the beach.

Q. What sign?

A. Where they had a tree blazed.

Q. Had what?

A. Had a tree blazed for a corner post.

Q. And some one showed you that east corner?

A. Yes, sir.

Q. Did they. But you didn't go on up over this ground here yourself? A. No, sir.

Q. On the east end of the claim? A. No, sir.

Q. And you haven't made soundings out in front of the east end of the claim; know what the bottom is? A. No.

Mr. CHENEY.—That is all.

Q. (By Mr. JENNINGS.) Mr. Carlson, just now considering that the fish-trap is there and you have

(Testimony of Charles Carlson.)

got some passengers on [408] the "Georgia" to land, to go to this claim, if there was no wharf there you would land at, you would go to the east end of the claim and land them in a small boat, wouldn't you? A. I guess I would, I think.

Q. If there was a wharf beginning at the point, running here and extending out there to where the fish-trap is and between, say, the point marked "37 feet" and the extreme west end of the claim, if there was a wharf running from "low," the word "low" to it, Mr. Carlson, you would—you would put the "Georgia" up against the wharf and land them on the wharf, wouldn't you?

A. Yes, sir; I would if run out as far as that, but if run out half way I wouldn't go in there.

Q. No; but then you wouldn't care to go to a wharf, that the face of the wharf between 37—at that point marked "37 feet" and the southeastern end of the trap, if that was the wharf, you wouldn't care to go there and land your passengers? A. No.

Q. And if there wasn't any wharf and wanted to get there you would land them over here on the east side? A. Yes, sir.

Redirect Examination.

Q. (By Mr. WINN.) Well, now, let me ask you, Mr. Carlson, they asked you about you would anchor off on this east end. Do you know whether any anchorage on this side? A. No, sir; I don't know.

Q. You don't know a thing about it?

A. Have nothing anchored there and further south of it.

(Testimony of Charles Carlson.)

Q. Of course, if no anchorage there, couldn't anchor there? A. No. [409]

Q. Now, Mr. Carlson, suppose we take into consideration the water immediately in front of these two lines of Mr. Barron's claim prolonged, I will ask you if, in your judgment, that it is possible to, within any degree of accessibility to the wharf, to maintain a wharf out from Mr. Barron's land anywhere in there with that fish-trap the way it is?

A. That I couldn't say exactly because I haven't examined the ground and I should think that a fellow want to build a wharf want to examine the ground, bottom. Of course, he can build a wharf out as far as the trap, I should think.

Q. You think could build it as far as the trap out here, if that was possible?

Mr. JENNINGS.—The trap isn't out here where you are pointing.

Q. (By Mr. WINN.) Well, to where, near it, out beyond this point. Now, I will ask you, Mr. Carlson, you know Chatham Straits well? A. Yes, sir.

Q. Now, knowing what, from what you know about wharves and docks, if you were going to build a wharf out, you wouldn't run the face of the wharf clear out into Chatham Straits beyond that point or beyond that reef?

A. No, I don't think would be very safe.

Q. No; the sheltered part of that harbor is after you get inside?

A. Yes, sir; that is what I always considered.

Q. Yes, sir. Now, taking that into consideration,

(Testimony of Charles Carlson.)

I will ask you this question, Mr. Carlson: I believe it is 172 feet from where this end, this lead line if extended would intersect the lower boundary line of Barron's claim is 172 feet from there out to the end of Barron's claim. Now, let's take just for the sake of the question and say this is—that this end in there is good ground, that you can [410] drive a wharf in there and say there wasn't any bluff there, now do you think as a navigator that in that 172 feet that it would be practicable and a feasible thing to do to build a wharf there and then go in there out to that wharf with that fish-trap built there the way it is?

A. Well, it wouldn't be so handy as it would if the trap was out of there.

Q. Well, now, in the night-time or in stormy weather if you wanted to come into a wharf there with that trap, it would then be practicable to do so?

A. Going into the wharf?

Q. Yes, sir. A. No.

Q. Would not. Have you had any experience about running up on these traps at night-time, Mr. Carlson? A. Yes; a few times.

Q. It is pretty hard to see them when as close in to the shore as this trap?

A. Yes; can't see them very well, but, of course, I never was in the cannery business or in the service of cannery boats, so I don't know exactly how you act, but several times we have had occasion to run close to them with the other boats. You can't see them before you are right up alongside of them.

Q. You know even in the case of a wharf where in

(Testimony of Charles Carlson.)

the shadow of the hill or mountain in the night-time, unless a moon-light night, it is pretty hard to make out the outlines of the wharf, don't you, Mr. Carlson?

A. Yes, sir.

Q. Now, that trap in there, the condition it is, would it be a menace or a nuisance in the way of getting in and out to [411] Barron's property any time in the night time with a steamer?

A. Of course, if you wanted to get inside of her, on the northern side, couldn't hardly get in there; couldn't very well do it.

Q. But this side of it, on this other side, you said you didn't know anything about it?

A. No.

Q. But suppose you just had that 172 feet left in there and had to build a wharf there, had to get in and out from that place, either coming up or down, would that trap furnish an obstruction in the way?

A. Oh, yes; certainly would both to some extent.

Mr. WINN.—That is all.

Recross-examination.

Q. (By Mr. CHENEY.) Wouldn't bother you any, Mr. Carlson, if you come from an easterly direction and just run out right up alongside the wharf and the wharf was clear out here, near this prolonged line, wouldn't bother you to land at the wharf because the trap was away over here, 500 feet away, would it?

A. So close to the wharf bound to be more or less bother. For instance, if the boats go in there and back out—all boats back to the port—and you have to provide for that when you go in there and have

(Testimony of Charles Carlson.)

to work to get out.

Q. If you went in and backed out. But suppose you didn't back out. Suppose we say there is a wharf running out here 400 feet in front of the east end of this survey and you come in from this direction—we will suppose it is deep enough water for you to come in, going to put out a party, and you land there at that wharf and this is all open water. [412] You are not confined to that line with my question. No line there; that is simply an imaginary line any way.

A. I understand.

Q. Now, this is all open water of Chatham Straits. You wouldn't have to back out over that if deep water there?

Mr. WINN.—I would object.

A. Certainly have to back out.

COURT.—Objection overruled.

Mr. WINN.—Exception.

Q. (By Mr. CHENEY.) Why, couldn't you turn around?

A. Couldn't turn around. There is shore over on that side.

Q. That is, say, up here? A. Yes, sir.

Q. You don't run—you don't understand that map to be land here?

A. Well, if you come up to the wharf north or south you come into it with the bow on. Don't come in with the stern on, and consequently have to back out. You won't have room to go ahead. You have to back out.

Q. Well, you wouldn't. There isn't nothing to back out or there isn't any land down here. It is all

(Testimony of Charles Carlson.)

open water. Suppose it is all open water, twenty fathoms here and say ten fathoms where this mark is made, Mr. Carlson, and the wharf comes out, we will say, to here, midway between that land there and this line and you are coming in from this direction there to land at that wharf, you don't mean to say you have got to back clear out into Chatham Straits?

A. Well, no; if the wharf was run out so far as that you would have room enough to go inside the wharf and turn around. Any wharf of that kind generally have to back away from it. [413]

Q. That is true of any wharf in the states. Something would apply to any wharf in the states?

A. The majority of wharves have to back out.

Q. What is that?

A. The majority of wharves have to back out.

Q. Why, Mr. Carlson, that is the same case with most of the wharves in the states? A. Yes, sir.

Q. You land up there at the wharf at Haines and land alongside of it with that—like that little boat does from Skagway, you have to get out by backing out? A. Yes, sir.

Re-redirect Examination.

Q. (By Mr. WINN.) Where is the protected part of that harbor, the protected part of it, near this peninsula? Would that be the place to build your wharf or the place Mr. Cheney was talking about?

A. The only protected place I saw, I should judge protected harbor is, according to my experience, is right about where that X is marked.

Q. Where the cross is marked upon the left hand

(Testimony of Charles Carlson.)

side of the line of piles as you go in. You consider that part as the protected part.

A. Yes; get a protection from the north wind from this peninsula and, of course, if outside the peninsula don't get no protection

Mr. WINN.—That is all.

COURT.—Anything else, gentlemen? That is all, Mr. Carlson.

Mr. WINN.—Call Mr. Alexander. [414]

[Testimony of C. J. Alexander, for Plaintiff.]

C. J. ALEXANDER, defendant, being duly called and sworn, testified as follows on behalf of plaintiff:

Direct Examination.

Mr. WINN.—I call Mr. Alexander, of course, as an adverse witness in this case, if your Honor please, being the defendant.

Mr. CHENEY.—You are not obliged to call him. No explanations are necessary.

Mr. WINN.—Yes, sir; I will take care of that, of course.

Q. Now, Mr. Alexander, you are the defendant in this case, aren't you? A. Yes, sir.

Q. You was a witness in this case on the motion for the dissolution of the temporary restraining order, weren't you? A. I was.

Q. Yes. You testified in that case?

A. Yes, sir.

Q. Now, Mr. Alexander, I will ask you if it isn't a fact—just withdraw that question. You are now acquainted with the boundary lines of U. S. Survey

(Testimony of C. J. Alexander.)

804, are you? A. Yes, sir.

Q. You are better acquainted with them than you were upon the hearing to dissolve that temporary restraining order? A. Much better acquainted.

Q. Much better acquainted. Now, I will ask you if you are also acquainted, Mr. Alexander, with the shore line along this claim or Mr. Barron's claim number 804?

A. Yes; I made it a point to make myself very familiar with the shore line of that claim.

Q. Yes, sir. A. Yes, sir. [415]

Q. And you were quite familiar with it when you were examined upon the witness-stand on the motion for the dissolution of the temporary restraining order, were you not?

A. Yes, sir; quite familiar. I think I testified as much.

Q. Yes, sir. Now, I will ask you, Mr. Alexander, if it isn't a fact and I will refer you to Plaintiff's Exhibit "D" in this case that the most feasible place of reaching this claim of Barron's is the sandy beach just along the shore, near the words here "mean" and "high"?

A. Why, I wouldn't consider it the most feasible place. I never have any trouble in getting ashore along there any where. I don't see any difference.

Q. Didn't you testify, Mr. Alexander, on that motion for a dissolution of the temporary restraining order that the most feasible and practicable place, or substantially to that extent, to land on this upland was along this sandy beach just where I have indicated?

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—Object to—

A. Well, I didn't—

Mr. JENNINGS.—Wait a moment. Object to it immaterial and irrelevant and an attempt to contradict his own witness and—well, it is immaterial and irrelevant as to what he testified on the former trial. If the Court please, he has produced him here now as his witness.

COURT.—I think under the statute he has a right to show that he testified to something different even if he is his own witness. I think you will find it there, Mr. Jennings, on page—

Mr. JENNINGS.—All right. I know, your Honor.

Mr. CHENEY.—He has to say he is taken by surprise.

Mr. JENNINGS.—I will withdraw the objection.
[416]

COURT.—Go ahead.

Mr. CHENEY.—You have to state you are taken by surprise if you want to contradict your own witness.

COURT.—No, I think not under that statute. That is a very liberal statute.

Mr. JENNINGS.—We don't object.

WITNESS.—I have forgotten the question, Mr. Winn.

Q. (By Mr. WINN.) I will ask you if you didn't testify on the witness-stand while in court upon the hearing on that motion for a dissolution of the temporary restraining order that the sandy beach along

(Testimony of C. J. Alexander.)

here, what I call "mean" and "high," was the really feasible, practicable place and the natural place for entering upon Mr. Barron's property from the water,— A. Well—

Q. —or substantially to that effect, did you?

A. Well, I wouldn't commit myself, Mr. Winn. I wouldn't deny that, this question, for the reason that the preliminary hearing was a year ago and I was on the stand for three or four hours and was asked a great many questions. The lawyers put in that testimony and my mind is not clear on all the things. I wouldn't deny it.

Q. You wouldn't deny it? A. No.

Q. Well, Mr. Cheney has a copy of your testimony. He has had the transcript. You have had a chance to read it over?

A. I haven't taken notes to do it. Don't know what it is in that respect.

Q. You haven't read it over at all? A. No, sir.

Q. You wouldn't say to the Court though you didn't testify to [417] that upon that preliminary hearing?

A. No; I wouldn't lay myself liable in that way because I do not know.

Q. Now, Mr. Alexander, is it not a fact that the shore line extending out to the westward from this sandy beach that I have just referred to is rocky and hilly and somewhat precipitous?

A. You are talking about the westward and you are pointing to the eastward.

Q. Talking about this out—well, out to the east-

(Testimony of C. J. Alexander.)

ward? A. Yes.

Q. Take it from the eastward then, isn't the shore line from the sandy beach out—clear out to the boundary line of Mr. Barron's claim rocky and hilly?

A. Positively not, that is, it is rocky. It is of a rocky formation, but it isn't this steep precipitous cliff as they described in their evidence. There is a low place on the easterly end of the claim, very similar to this on the westerly end, the end as described in this sandy beach here.

Q. Well, now, didn't you testify upon that hearing for the dissolution of that temporary restraining order when the following question was put to you in this manner, didn't you answer it as follows: "Q. On both sides of this little bay, it is rocky?" You answered: "Very rocky formation; yes, sir." Now, did you answer that question that way?

A. I think possibly I may have; yes, sir.

Q. Yes, sir. Now, then—

A. It is a fact I never—

Mr. CHENEY.—I just want to let him answer the question.

Mr. WINN.—He has answered the question.

COURT.—Oh, yes, Judge Winn, you are allowed the liberty [418] to call this man as your witness and then virtually cross-examine him. You must let him explain.

Mr. CHENEY.—I ask that he be allowed to explain as he stated he would. I ask that the witness be allowed to explain his answer.

COURT.—Yes.

(Testimony of C. J. Alexander.)

A. There is this sandy beach and this peninsula which runs out there and the point running out which forms that peninsula is a rocky formation, all rock, nothing but rock. There is a steep precipitous cliff inside of my trap or where my trap points, for that is all either side of this sandy beach described, then beyond the trap to the eastward again there is another low beach, very similar to that on the westerly end of the claim.

Mr. WINN.—Now, if your Honor please—

Mr. JENNINGS.—Just a moment.

Mr. WINN.—Just wait. I have the witness. I want to state I put to the witness an impeaching question, if the Court please—

Mr. JENNINGS.—Impeaching his own witness.

Mr. WINN.—That is just exactly what I am doing. Here is what I attempted, if your Honor please. I was up against the proposition the other day, against the same proposition. Mr. Rustgard impeached a witness. Now, here is what he did, he put that abstractly to the witness as an impeaching question. I said, “Didn’t you testify on the other trial and answer the following question: ‘On both sides of this little bay, it is rocky?’ and answer ‘Very rocky, formation; yes, sir.’ ” Now, he can either answer that by yes or no. [419]

COURT.—Yes, Judge Winn, he could, but let’s see what the Court is after. If the man has any explanation to make to that, I want to have it now for my own benefit, if not for his benefit. Now is the time. It might be overruled hereafter, and there is no abso-

(Testimony of C. J. Alexander.)

lutely no rule of evidence that prevents him from explaining. No, no; this is not unfair—no,—to have the evidence there before you that this man gives. Now, you are allowing to cross-examine. You are allowed even to impeach him, but certainly no rule of evidence ought to prevent him from having an opportunity to that.

Mr. WINN.—I don't *don't* that, but I think ought not be permitted when coming in—

COURT.—Explain right now, Judge.

Mr. WINN.—All right, I will take an exception to your Honor's ruling,—am putting it as an impeaching question; and I want to ask another question.

COURT.—The witness has a perfect right to explain impeaching questions even proved by you. It is only fair for him when asked categorically whether or not he did say so and so or so and so, he has a right to explain just what he meant and it goes to the Court or jury—this explanation—what he meant then.

Mr. JENNINGS.—If the Court please, my objection to this whole proceeding is simply this. Judge Winn apparently has not produced the witness to swear to something for his side of the case. He has produced the defendant here to see if he can't catch the defendant in some contradiction now, that is what this man denies or asserts. He is asking the witness not for the purpose of eliciting testimony to support his case in chief but he produces the witness, the defendant, on the witness-stand for the express purpose of [420] impeaching him. Now, that is what he did it for the express purpose of impeaching him,

(Testimony of C. J. Alexander.)

when the defendant is not a witness in the case yet at all, except so far as he has produced him. Of course, I admit that if a man, if a plaintiff or one party puts a witness on the stand and he is surprised by his testimony—he asks him a certain question—he is surprised by his testimony, when he can say he didn't understand so and so and such and such at such time. But what is the case here. For the difference here the case. Here is the plaintiff putting the defendant on the stand for the express purpose of trying to make him contradict himself; not for the enlightening of the Court or getting the facts in the case out, and that is what this means. It seems to me when it says that the party producing a witness may show that he has made some misstatements outside the court that lead him to believe he would give the same on the stand here.

COURT.—No, I think, Mr. Jennings, that a party may be called. Now, Judge Winn has asked this witness certain questions, other questions that he has asked his own witnesses. Now, whatever may be Judge Winn's purpose, the Court is dependent upon the good faith of counsel and so long as this witness is only asked questions that are germane—if he has made any contradictory statements elsewhere in this court or anywhere else, it is only competent his attention should be called to them and if that impeaches the testimony given here, the Court has a right to consider that. No, I think that line of examination is competent.

MR. CHENEY.—Just now, your Honor, before we

(Testimony of C. J. Alexander.)

proceed any further if you are ruling that way, I would ask that Judge Winn instead of asking the questions the way he has taken to [421] ask them and not telling him what he did swear to and only saying substantially, that he should put the direction question as testified according to the record if on that hearing you were asking that question, if you didn't say so and so in answering that question, and then give the witness a chance to answer and to explain.

COURT.—That is substantially what is being done, Mr. Cheney. [422]

Q. (By Mr. WINN.) Now, I will ask you, Mr. Alexander, if at the time of the preliminary hearing or rather the hearing to dissolve the preliminary injunction in this case, if you had completed your fish-trap at that time?

Mr. JENNINGS.—Object, incompetent and irrelevant.

Mr. CHENEY.—Isn't asking him anything.

Mr. WINN.—I want to find out the condition the trap was in at that time.

The COURT.—I don't think it is material what condition the trap was in at that time; I don't think that that is material at all.

Mr. WINN.—Take an exception, if your Honor please.

Q. Now, Mr. Alexander, have you—when you completed that trap—

Mr. JENNINGS.—Object, immaterial and irrelevant.

The COURT.—He may answer.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—The question isn't when it was completed—when.

COURT.—He may answer.

A. I completed it, as near as I can remember, well, a few days after the dissolution of this restraining order after the—right out from here after that time and proceeded to complete it.

Q. (By Mr. WINN.) O, yes; what did you do after the dissolution of that restraining order to complete the trap?

Mr. JENNINGS.—Object to, immaterial and irrelevant.

COURT.—No, he may answer that question.

A. The first thing I did was to drive an additional eight piles, Judge, I think. I claim it would make, after that, the trap regular, it being complete, which formed and made a complete trap, making a pot, heart and lead, which is a complete fish-trap.

Q. That is what you call a complete fish-trap, is it?

A. Yes, sir, a complete fish-trap is a back or pot, heart and lead.

Q. Where did you get that definition?

Mr. JENNINGS.—Objection.

COURT.—Yes, that isn't necessary. [423]

Q. (By Mr. WINN.) Well, you don't consider that lead to the fish-trap any part of the fish-trap?

A. That is one of the parts I have mentioned,—the pot or back, heart and lead constitute a fish-trap.

Q. Now, you know the condition that fish-trap is in at present, don't you? A. Well, I know—

Q. When were you out there last?

(Testimony of C. J. Alexander.)

A. I was out there within a week or ten days ago.

Q. Yes. Well, you heard the testimony of Mr. Hill, didn't you, in court, and several other witnesses?

A. I have heard all the testimony that has been given in this case; yes, sir.

Mr. CHENEY.—Just a moment, Judge Winn. I suppose it is understood in regard to that if counsel cross-examines him now he is not allowed to cross-examine him again on the same question when we put him on, that would make this record ten thousand miles long.

COURT.—For you to determine that.

Mr. WINN.—I didn't know whether you was going to put him on; that was what I was afraid of.

COURT.—Well, proceed.

Q. (By Mr. WINN.) Now, then, Mr. Alexander, I simply want to know when you stated to the Court—when you say that you completed that fish-trap what time you completed it?

Mr. CHENEY.—Object, that is repetition. Same question you asked him.

COURT.—Objection overruled.

A. Well, I gave that to you. I have testified that I finished this trap all up, as I say, it was somewhere sometime after the dissolution of this restraining order.

Q. (By Mr. WINN.) And you went out there after the dissolution of the restraining order and only put eight piles there to [424] complete it?

A. Oh, no; I did not. I put more piles there.

Q. How many did you put there?

(Testimony of C. J. Alexander.)

A. I put eight piles in to complete it.

Q. Then, what did you do with the lead. What did you do with the lead. Did you drive any more piles than that? A. I certainly did.

Q. How many?

A. Well, fourteen or fifteen, perhaps.

Q. Extended out how many feet towards the shore?

A. Well, I would say two hundred feet or more.

Q. Then, at the time of the dissolution of that temporary restraining order, your trap wasn't complete, was it? A. Completed all—

Mr. JENNINGS.—Objection, incompetent, irrelevant and immaterial.

COURT.—He may answer.

A. — but the eight piles in this heart, it was a complete trap; yes, sir.

Q. (By Judge WINN.) Now, you say it was a complete trap without the eight additional piles attached and you defined a fish-trap a short while ago as being constituted of a lead and several other portions? A. Yes, sir.

Q. Now, then, do you want the Court to understand that your fish-trap was just as complete on the day of the dissolution of that temporary restraining order as it was after you put those fifteen or sixteen piles in the lead?

Mr. JENNINGS.—Object, immaterial and irrelevant. Just as complete is different from being completed; he said being a complete trap.

Mr. WINN.—I suggest the witness is not an adverse witness.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—No suggestion to the witness, Judge Winn. [425]

COURT.—No, I don't think, Judge, it is at all material to this, and don't make any difference whether he completed it, how much he had to do to it. The question is, what is there now?

Q. (By Mr. WINN.) I will ask you, Mr. Alexander, if this question wasn't put to you upon the hearing on the motion to dissolve that temporary restraining order: "Now, I will ask you if the trap is complete as it stands now so far as the location is concerned with reference to the tide land?" That is answered: "Yes, sir." Too, that is, I mean you answered, "It is complete." Now, was it a complete trap just as it is now and just as it was in the middle of last April as it was when you testified on that motion for a preliminary hearing. I want to get at what you consider a complete trap?

A. It was just as—

Mr. JENNINGS.—Wait a minute. Object to that, incompetent and immaterial and irrelevant.

COURT.—I don't see as it makes any difference, Judge Winn, when this man completed his trap or when he thought he completed it. You are asking for an injunction here, contending that he is blocking your right of way. Now, the question the Court is to determine is: what is there now and *does what is there now* interfere with your passage way. Now, what he may have thought about a trap is certainly not your case in chief.

Mr. WINN.—Well, if your Honor please, I don't

(Testimony of C. J. Alexander.)

want to tell the witness what I am leading up to you see. Just let me show some part of this witness' testimony here to get it.

COURT.—No way to get it in here. You can't call this man for the order—purpose of impeaching him—making him your witness to impeach him.

Mr. WINN.—I understand that.

COURT.—The thing is then to ask him something material if you want to impeach him, or ask him some material fact. [426] Don't take up time on questions that the Court has ruled are immaterial several times.

Mr. WINN.—Yes, sir, I will take an exception to your Honor's ruling.

COURT.—Yes, sir.

Q. (By Mr. WINN.) Now, I will ask you, Mr. Alexander, if it isn't a fact that you testified upon the hearing to dissolve the temporary restraining order that the reason your trap as it was then constructed did not obstruct Mr. Barron's going in and back and forth from deep water to his upland was for the reason that your lead did not extend any closer than about three hundred feet from the shore line, and that was the reason that you gave your trap didn't obstruct Mr. Barron's access to his upland?

Mr. CHENEY.—Now, just a moment.

Mr. WINN.—Your Honor can see the materiality of it.

Mr. CHENEY.—I thought it was understood with Judge Winn that he put fair questions to the witness and at least read the question and give him a chance to answer it.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—We object to that as immaterial and irrelevant.

COURT.—The only way it would be material is this, Mr. Jennings; it is probably a little out of order, but if he did not ask the witness in the first place whether or not the trap as constructed now if that interferes with him and the witness had set no time he might ask him if he didn't testify to this on a former occasion. But I suppose it is only a matter of order. He may answer.

Mr. CHENEY.—Counsel has that question before his face; why can't he read this question before him?

WITNESS.—What was the question, Mr. Winn, please?

Q. (By Mr. WINN.) I will go back at it the way counsel wants to. Probably it is the better way. Now, Mr. Alexander, you know [427] upon the hearing of that—to dissolve the temporary restraining order that the question that was being tried then was as to whether or not your structure as you had it then built obstructed the free ingress or egress in and to the property of Barron's from the deep water or not? You knew that was the question that was being tried? A. Yes, sir.

Q. Now, then, you at that time only had the portion of your fish-trap constructed that is indicated on this exhibit "D" that extends from what is marked upon here "Barron's piles" down to *this word* along here "Alexander's piles"—that is the only length of the trap that you had constructed at that time, wasn't it? A. Yes, sir.

(Testimony of C. J. Alexander.)

Mr. JENNINGS.—Object, incompetent, irrelevant and immaterial.

COURT.—He may answer.

Q. Now, then, since that time you had the piles put in that are indicated in black lines here that extend out toward the shore, didn't you?

A. Yes, sir, we admit those facts.

Q. Now, then, isn't it a fact, Mr. Alexander, that you testified on that application that the reason why that your trap as it was then constructed didn't interfere with boats going in and turning round and coming out up to Barron's property was because that your lead was somewhere two hundred and fifty or three hundred feet from the shore line?

Mr. JENNINGS.—Object to it, immaterial and irrelevant.

COURT.—He may answer.

A. Well, I don't remember that question asked, Mr. Winn, as it was put to me. I do remember a question that was asked me regarding the opening in there. I testified that, I do remember [428] that I could not drive the piles in any further.

Q. Yes? A. I remember that.

Q. Well, when did you find out that you could drive piles in any further? A. On—

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—I don't think that is material, Judge; as a matter of fact, I don't think any of it is material.

(Testimony of C. J. Alexander.)

Mr. WINN.—It is only the condition, if your Honor please.

COURT.—Now, Judge Winn, let us see. Let us understand each other. It doesn't make any difference what this man testified to on a former occasion as to whether or not this Court is going to give you an injunction or not, unless the evidence shows that you are interrupted. Now, if this man had come here and given his opinion that it wasn't at all cut off or I mean getting to the upland wasn't cut off by reason of your—by reason of his trap, then I say why it would be perfectly proper and competent for you to ask him these questions as to what he testified on the former occasion. But is that true? He hasn't been called as a witness. He hasn't yet testified that you were interrupting him—I mean he was interrupting you; whether he was cutting off your access or not. So it does seem to me that it is merely calling the man to the stand for the purpose and for no other purpose than impeaching him. That isn't competent at this time.

Mr. WINN.—The only thing I think would be, your Honor, would be this; it is true the way the pleadings are in this case that they have denied that they ever extended this line out to the beach. We allege that in the complaint that they did do it. [429]

COURT.—Yes.

Mr. WINN.—And that was one of the principal reasons why they were obstructing our way. They denied that. Now, then, I am calling this witness

(Testimony of C. J. Alexander.)

on the witness-stand, if your Honor please, either for impeachment or to prove my side of the case. Now, I ought to be able to show by him that they did extend this lead line out there according to my supplemental pleadings.

COURT.—Certainly, you can prove anything upon the ground, existed on the ground, isn't any question about that.

Mr. WINN.—I am getting at this other purpose. Maybe I have the cart before the horse, but it is this purpose I am contending for—that Mr. Alexander's testimony on the previous hearing was this: That the reason he wasn't interfering with this upland and the entrance to it, and so forth, was because he was three hundred feet away from here—

Mr. BURTON.—More than three hundred feet.

Mr. WINN.— —more than three hundred feet. Now, then, I am asking about the things that is in here and I am going to put the question to him as to whether or not his trap being built in the way it is in there doesn't interfere with the ingress and egress to this property.

COURT.—If that was gone into, Judge Winn, there might be some reason for trying to contradict him, but there isn't any reason at this time.

Q. (By Mr. WINN.) Then, I will ask that—now, I will ask you, Mr. Alexander, as to whether or not this trap as it is now completed, and when I say now I mean as you fixed it last season, by filling this out to connect with the upland—I will ask you if in your judgment that interferes with the ingress

(Testimony of C. J. Alexander.)

or egress to and from Barron's property to deep water with steamers or [430] gasoline boats?

A. Well, of course, the trap being situated in front of the claim there it covers a portion of the frontage of the claim without a doubt. We have it on paper, I think by laying a right angle, a right-angle triangle over the meander line on that claim on either side of the trap that it shows that we are covering an area of the face of the claim at average low-tide line of two hundred and thirty feet. By drawing a line from No. 1 to No. 2 corner of the claim and by bringing a right triangle on either side of the trap we are covering a frontage from the meander line of the claim out to deep—clear to the coast of Japan, if you please—of a distance of 270 feet.

Mr. CHENEY.—Let him get the answer in.

Mr. WINN.—Let him get away from the coast of Japan. No use of this witness getting foolish.

Mr. JENNINGS.—We want to get funny, too.

COURT.—Well, gentlemen, if counsel wouldn't talk so much we would get along a good deal faster. Proceed.

WITNESS.—I have answered the question, I think.

Q. (By Mr. WINN.) Now, you haven't answered the—I don't think I asked you this question as to whether or not that that trap built in the way you have it then take and connected up from your last pile in the lead, nearest the shore, on upland, by stretching web or wire there the way you had it stretched, as to whether or not that trap completed

(Testimony of C. J. Alexander.)

that way didn't interfere with the ingress and egress to and from Barron's upland?

Mr. JENNINGS.—Now, wait a minute. We object to that, if the Court please, because it is a conclusion of law. Is not whether that interferes, but whether it prevents.

COURT.—Well, that may be true, Mr. Jennings, but I want to ascertain how it prevents that, also the extent of the [431] interference. I think the question may be answered.

A. Why, if I were to answer it—answer that question with an unprejudiced opinion I would say that the trap is obstructing the access and egress to that portion of the claim which I have described here, east of the trap, covering the front of it; but in no way, as I can see, interferes with access or egress to either of the claim.

Mr. WINN.—Yes, that is your judgment?

A. Yes, sir.

Q. Now, then, Mr. Alexander, I will ask you if you wouldn't consider your fish-trap as complete before you put these additional piles in the lead line?

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—Objection sustained. I think he has answered that any way, but it is not material.

Q. (By Mr. WINN.) Well, now, Mr. Alexander, isn't it a fact that on the previous hearing that you said that the reason your trap as then constructed there—you wouldn't have the fifteen or sixteen piles

(Testimony of C. J. Alexander.)

in the lead at that time—the reason it didn't interfere with the ingress and egress to and from this upland of Barron's was because that the end there of your lead was some five or six hundred feet from the shore line?

Mr. JENNINGS.—Object to it, immaterial and irrelevant. If the Court please, that would be a contradiction of what he says now.

COURT.—Objection overruled.

A. Well, I don't remember—I don't remember whether I did or did not, or whether there was such a question put to me. I can't remember. I wouldn't say that it was not.

Q. (By Mr. WINN.) The putting in of these eight additional piles [432] which you said that you put in some time after the hearing on the motion to dissolve that temporary restraining order that wouldn't bring your trap any closer to the shore line, would it? A. No, sir, it would not.

Q. Now, Mr. Alexander, where is this bluff on the shore line on Barron's property if—is it anywhere in the neighborhood of the prolongation of the line of the lead of your trap? A. Why, the—

Q. The highest part of the bluff?

A. I don't just quite understand it.

Q. I say, suppose you prolong the line—the lead of your trap on to the upland, etc., would that strike what you term the highest part of the shore line on Barron's claim?

A. Well, I don't think it would strike the highest part. I would cover—just strike the southerly end

(Testimony of C. J. Alexander.)

of this cliff that has been described—between the end of the lead and the sandy beach described in the complaint.

Q. Yes. Now, then, Mr. Alexander, you say, I believe, that in the construction of your trap the way you ultimately finished it and the way it is now or the way you fished it, and that it does interfere with the ingress and egress of that part of the upland of Barron's that it comes out in front of? Then, you mean that part of Barron's claim that extends from where your lead line would intercept the lower boundary line of Barron's claim with the corner No. 1, do you?

A. No, I did not. I mean where my lead would end. There has been a misrepresentation as to that line in evidence here. That lead never ran up there to connect with the upland by cable to it or anything else.

Q. Well, now, what do you mean that it would interfere with a portion it is in front of? [433]

A. Yes, sir, if you wish—

Q. Would you say, Mr. Alexander, that in the fishing of this trap last summer that you didn't have a cable that run from that last pile off to the shore here and connected it with web in there?

A. Oh, yes; but not fastened up on the upland as has been described here in this evidence, because it didn't run to the upland, but run to low-water mark or just far enough above low-water mark to enable me to fasten it to the rock and so as to get shear of mine under it and to hold it.

(Testimony of C. J. Alexander.)

Q. You would have your lead line run up as far as ordinary low tide?

A. Yes, sir, and I admit that.

Q. Well, taking that in consideration, that would leave your trap then covering a space from the nearest pile which is marked on this map, Plaintiff's Exhibit "D," then one hundred and forty feet from shore. Now, with that fact, extend that line prolonged on up to the shore, then you contend that you would only interfere with the ingress and egress to Barron's claim from that point out to corner No. 1 of Barron's claim—is that it?

A. Well, I wouldn't care to testify as to anything to that plat because that is an incompetent and incorrect survey of that place.

Q. You don't go much on that plat?

A. I don't think could count on it, that is the lines of the survey may be all right, but the position of the point of the trap or the points relating to the trap is entirely wrong; the soundings are wrong.

Q. Oh, I see. You don't agree with any of that part? A. No, I do not. No. [434]

Q. Well, now, when you answered the Court a while ago that it interfered with the part in front of it, what do you mean just now?

A. Well, I will explain it on the chart if I was allowed the use of the chart for a moment.

Q. Well, let's look at this exhibit "D." What part would you say?

Mr. JENNINGS.—He says that exhibit is not correct.

(Testimony of C. J. Alexander.)

COURT.—If he can explain it from that, all right.

A. Well, I can explain from that, I suppose, yes, sir; I would say that the trap obstructs that portion of the claim or the access and egress to that portion of the claim which the trap covers, taking a right angle from the meander line of this claim out on either side of the trap. With that line you have 200 feet or 400 feet or 600 feet, I would say that the trap obstructs that much of the frontage of it.

Q. (By Mr. WINN.) Well, now, isn't it a fact that the most natural place and feasible place for landing on Barron's property is along on that beach just within that distance which you have just now described?

Mr. JENNINGS.—Object, immaterial and irrelevant. The question isn't the most natural and feasible place. The only natural and only feasible place, that is the proposition.

COURT.—He may answer. Let him tell all about it.

A. Well, no; it is not, because taking—

Mr. WINN.—You have answered.

Mr. CHENEY.—Let him complete the answer.

Mr. WINN.—You say it is not. That is all your answer.

COURT.—Well, he wants to complete it, I think, Judge Winn.

Mr. WINN.— All right.

A. Because taking a right angle line from the meander line front of that claim—the meander line in front of that [435] claim, in front of the cabin

(Testimony of C. J. Alexander.)

or from this sandy beach, which is described, if you were describing a right angle from this land right out into deep water you might extend that line to the middle of Chatham Straits and this is no portion or part of that fish-trap.

Q. Now, let me ask you, Mr. Alexander, if the following question wasn't put to you on the examination on the hearing for the dissolution of that temporary injunction and you answered it as follows: "Well, isn't your trap constructed in a sort of cove"? Answer: "Yes, right in a sort of a cove." "Now, isn't that the most natural place for landing boats in that cove"? "Yes."

Mr. CHENEY.—That is the question you asked him just now?

Q. (By Mr. WINN.) Now, isn't your trap constructed right now in the most natural place, you consider it, to reach Barron's property?

A. Well, that is a hard question to answer, Judge Winn.

Q. Well, I will ask you if this question wasn't put to you, Mr. Alexander, and I want you to say yes or no to it. I want a direct answer. "Well, isn't your trap constructed in a sort of cove?" Answer: "Yes, right in a sort of cove." "Now, isn't that the most natural place for landing boats in that cove?" Answer: "Yes." Didn't you answer that question that way? A. Probably I did answer.

Q. Yes.

A. I think I remember the question, yes, sir; I wouldn't deny it, however.

(Testimony of C. J. Alexander.)

Q. Well, then, the following question is: "Isn't that a fact, Mr. Alexander?" and the answer: "It would naturally be." You answer that, didn't you that way? [436]

A. Possibly so.

Q. Well, do you say whether you did or not, Mr. Alexander. I would like to have a positive answer?

A. Well, Mr. Winn, I don't like to commit myself as I have explained to you before.

Q. Well, now, I don't want an explanation. I simply want to know and I want to go into this matter. This is an important question—I want to know—I will put these questions and I want to know whether you testified to these questions or not?

Mr. CHENEY.—This is objected to, of course, immaterial.

COURT.—He may answer.

Q. (By Mr. WINN.) "Well, isn't your trap constructed in a sort of cove?" "Yes, right in a sort of cove." Did you answer that question that way?

A. I think I answered that question that way.

Q. You think you answered that way. "Now, isn't that the most natural place for landing boats in that cove?" Answer: "Yes." Did you answer that question that way?

A. Well, I think I remember the question; yes, sir. I didn't deny it. Yes, I will answer yes, any way that I did.

Q. Now, the following: "Isn't it a fact, Mr. Alexander?" Answer: "It would naturally be." You answered that question that way. He asked,

(Testimony of C. J. Alexander.)

“If isn’t that a fact that is the most natural place,” and you said, “Yes, it naturally would be.”?

A. Yes, I guess so.

Mr. JENNINGS.—If most natural place would be most natural place.

Mr. WINN.—Well, if it please the Court, Mr. Jennings’ remarks are not called for at all. I am only addressing my remarks to you. I don’t like the record encumbered with these remarks.

COURT.—No; leave all remarks out of it, gentlemen, or [437] so much of it as we can. Proceed.

Q. (By Mr. WINN.) Now, then, you did extend your trap out to the shore so as to bring it above the line of ordinary high tide, didn’t you?

A. I did not.

Q. Well, didn’t you extend the web which constituted a part of the lead out to the line of ordinary high tide? A. I did not.

Q. Well, didn’t you say a while ago that you put a cable there and put your web on it and extended the web out as far as the line of ordinary high tide?

A. I did not.

Q. Well, what did you put out there?

A. I put a cable and some web out there, but I did not extend it on up to the line of high tide.

Q. I did not say high tide.

A. That is what I understood you to say.

Q. I say, didn’t you extend you web and cable out to where your web would reach the ordinary low tide—but your cable went above that?

A. Well, a very short distance above it there was

(Testimony of C. J. Alexander.)

perhaps where this cable was attached to the shore, attached to the boulder, perhaps this was twenty feet from the water at extreme low tide, perhaps thirty feet, I wouldn't commit myself.

Q. But your cable, so as to finish a part of the lead of your trap, did extend to the line of ordinary low-tide?

A. It did extend to the line of ordinary low tide.

Mr. CHENEY.—You said ordinary high tide in the first place.

Mr. WINN.—Well, maybe I did, yes, sir. [438]

Q. Well, now, then, Mr. Alexander, didn't you—didn't you testify upon the preliminary hearing of this case that you did not extend—didn't expect to extend the lead of your trap out towards the shore any further than it was then?

Mr. JENNINGS.—Object, immaterial, irrelevant. The Court has ruled on all that class of testimony a dozen times.

COURT.—Yes. Objection sustained.

Q. (By Mr. WINN.) Then, I will ask the—I will ask you this question, Mr. Alexander: now as a fish-trap man, if you don't know it is a custom generally as a fish-trap man, I will ask you if it is not a custom to always extend the lead of the trap as near out to the shore as you can, that is isn't that the practice?

A. O, no, not in all cases, Mr. Winn.

Q. Well, you did extend this on out, didn't you?

A. Yes, I extended this on, yes, sir.

Q. But you don't think it is customary to do so?

A. Well, it is customary in some cases. It de-

(Testimony of C. J. Alexander.)

pend upon conditions. I had my reasons of course for extending this on out and conditions were brought about which justified it.

Q. Well, now, Mr. Alexander, I will ask you if that is the usual way of building traps in these waters? A. Which is the usual way?

Q. Of extending them out to the shore line?

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—The question is what is here, Judge Winn; what is customary is not material.

Mr. BURTON.—May be an impeaching question, if the Court please; I think he testified at the preliminary hearing; of course, it is not material. [439]

COURT.—Impeaching him then on immaterial matters is not competent.

Q. (By Mr. WINN.) Now, then, I will ask you if in answer to the question that Mr. Burton put to you in regard to extending this trap out to the line of ordinary low tide if you didn't state that you wasn't going to do it; wasn't customary to do it; and wasn't building this trap to catch rabbits?

Mr. JENNINGS.—Object to as immaterial and irrelevant.

COURT.—Objection is sustained.

Mr. WINN.—I will take an exception to your Honor's ruling.

COURT.—Yes.

Q. (By Mr. WINN.) Now, don't you know, Mr. Alexander, that you testified substantially and right along without putting the questions to you, that the

(Testimony of C. J. Alexander.)

reason that your trap wasn't interfering with the ingress and egress to and from Mr. Barron's property at the time this was up on the hearing for the dissolution of the temporary restraining order was that you had left plenty of water between the end of your lead and—the end of your lead at low tide and the upland for any steamer to get around in there; didn't you testify substantially to that?

Mr. JENNINGS.—Object, immaterial and irrelevant and repetition.

COURT.—He may answer.

A. I testified in the other hearing I will admit that I did not intend to continue this lead in any further; that the water was navigable through there; that I had sent boats through there and had saw boats go through there; but I don't remember as to answering it in just that light, Mr. Winn.

Q. (By Mr. WINN.) Now, we will see what you testified. Didn't you say—positively swear at that time that your trap was complete—not what you intended to do— [440] but it was complete at that time?

Mr. JENNINGS.—Object, immaterial and irrelevant.

COURT.—The Court has ruled on that, injecting something immaterial in this case would not justify it.

Mr. BURTON.—Wouldn't that go to the credibility of the witness at the preliminary hearing? He testified he did not intend to connect it with the land. Now, if we want to test the credibility of this

(Testimony of C. J. Alexander.)

man's testimony, isn't it proper to show that at the preliminary hearing he testified that the trap was complete?

COURT.—That is all true, Mr. Burton. The rule is well settled, Mr. Burton, that you cannot impeach a man except on something that is germane to the case. Now, I say what his intentions were at that time cannot be germane. If you can show he testified as to whether or not he was cutting you off, now that is germane. Then, if he has given testimony which in some way contradicts it directly or by inference with anything which exists now, that is germane; but what his intention was at that time and what he has done since cannot be.

Mr. BURTON.—I haven't given much attention to the trial of this case but the point at issue is this: taking either your Honor's view or the view of opposing counsel, the point is whether or not the accessibility of this upland is interfered with. Now, taking that as a basis, we are endeavoring to show by this witness—he is our witness—that the accessibility of that upland is interfered with. Now, from his own statements we can impeach him on his statement at the preliminary hearing upon the motion to dissolve the preliminary injunction where he testified that the accessibility of that [441] upland was not interfered with by reason of the fact that the trap was complete. Now, this was asking for a preliminary injunction, if the Court please, and restraining them from completing any trap because it would interfere with our obtaining

(Testimony of C. J. Alexander.)

access to that upland. Now, then, we are at present prepared, if the Court please, to show by this witness that he testified upon that hearing that his trap was complete and was ample water not to interfere with the accessibility of the upland around that particular place—the accessibility of the upland around the piles as then driven—that the accessibility of the upland was in no way interfered with at that time. He testified also to the depth of the water, showing that our accessibility was easy. Now, then, if the Court please, isn't it perfectly proper to show at this time, after we have shown, for instance, by the questions to him, that these piles driven—this is done along the lead extended on from the shore, and ask him if that interferes with navigability, and then ask him if at the other time he did not testify that the access to the upland was easy because the lead didn't reach as far as that?

COURT.—Well, the Court has not excluded that testimony. The Court has said time and time again what this man's intention was at that time, what he testified as to his intention, what he said he was going to do—that was not competent. This is competent if you ask him now if he obstructs if he considers he obstructs your access; that is competent, and if he says No, then, it is competent to show that his testimony on a former occasion may be in some way in conflict with what he gives now. But the questions that the Court is ruling out are what his intentions were and what he [442] said

(Testimony of C. J. Alexander.)

that his intentions were on the former occasion: that is material.

Mr. BURTON.—Do I understand, if the Court please, we can ask him questions with reference to the accessibility at the time—

COURT.—Let us not argue.

Mr. BURTON.—I am not arguing; I want to know the point your Honor is passing on.

COURT.—I am passing on this—I tried, gentlemen, to make it clear—this man is called as an adverse witness; the Court has permitted cross-examination—the counsel to cross-examine him now on anything that is germane to the case. Now, if he testified regarding the question of accessibility or inaccessibility by reason of this structure, then anything that he may have testified to on a former occasion is germane.

Mr. BURTON.—Yes, you Honor.

COURT.—It seems to me that the position of the Court ought to be clear, gentlemen, and let us not take up so much time in controversy.

Mr. BURTON.—I beg your Honor's pardon, I hadn't taken up much time.

COURT.—That is so, Mr. Burton, but this is a court of equity and the Court is anxious to hear testimony which is material or germane, but it is so clear to my mind that this is not germane; and if the evidence becomes germane when this man is put on the stand you can go into it then. The Court is not going to exclude anything that will shed light on it.

(Testimony of C. J. Alexander.)

Mr. BURTON.—I trust your Honor is not imputing any such [443] motive to me.

COURT.—I am not imputing it to anyone, but it seems to me we are all taking up too much time with reference to this procedure. When the Court lays down what is the proper procedure I think the counsel ought to follow it.

Q. (By Mr. WINN.) Here are a couple of questions. I am going to read them off and let your Honor rule on these. This question: "Now, Mr. Alexander, was it not your intention to at least get these piles as close to the shore line as possible to prevent salmon from getting by your trap?" And then you answered: "I don't intend to enlarge—to extend these piles in to obstruct the navigable water way inside of my trap."

Mr. CHENEY.—Object to that.

Mr. WINN.—I just want a ruling.

COURT.—Yes, I think that is objectionable; I don't think it is material.

Q. (By Mr. WINN.) "That isn't now a full answer. Do you, Mr. Alexander—just answer this question—state whether or not you intend to drive those piles so as—in closer to the shore—so as to get in shallow water and prevent the salmon from getting around your trap. Answer that by yes or no." He answered, "No." And then the following question—I will read them all, then your Honor can see the purpose of them. "Then, Mr. Alexander, your complete trap, that is when completed, you want the Court to understand that when your trap

(Testimony of C. J. Alexander.)

is fully completed that there will be navigable water at the end of your trap nearest to the shore line?"

"Yes, sir." I think these questions you see, on account of that last one, are admissible. [444]

COURT.—No, I think not; I don't think any of them are admissible.

Mr. WINN.—I will take an exception.

Mr. CHENEY.—I will object to them. I did not object to the last one. I think the objection ought to be before the ruling.

Mr. WINN.—Well, he considered the objection at the time of the ruling.

COURT.—Yes.

Q. (By Mr. WINN.) The following question was asked Mr. Alexander: "How many feet are you away from the extreme low tide of the shore line?" I will just read these off and you can object to them so as to get them to the Court. "Well, I would say approximately three hundred feet." "Q. Three hundred feet out from—" And then the question is cut off. Answer: "The extreme low-water mark." Question: "Three hundred feet out into the water at the present time?" "Yes, sir." "How near to this shore line will you come when the trap is completed?" "That will be as near as I will come, approximately three hundred feet to low-water mark." That is along the same line.

Mr. JENNINGS.—Object to those questions for the same reason, that they are immaterial and that matter was decided on the other hearing.

COURT.—Objection sustained.

(Testimony of C. J. Alexander.)

Mr. WINN.—Take an exception.

Q. Just one more on that. Now, then, Mr. Alexander, I will ask you, you have testified considerable concerning your opinion as to how this trap extended with the end on the left-hand side of the cove as you go in—now, I will ask [445] you if it is possible to build a wharf out from this portion of the claim just between the intersection of the prolongation of your trap lead and the easterly side line of this claim—if a wharf was built there by Barron could have access to his upland whether or not your fish-trap as it is now constructed or as it was constructed when the motion to dissolve the preliminary injunction was had, whether or not it would interfere with the lead—would a wharf so constructed?

A. Why, in either case in my estimation, so far as the construction of a wharf is concerned, if such is possible, the conditions are just as favorable toward building a dock on that end of the claim as they are on the other end of the claim, I don't see any difference. The formation of the upland is practically the same, nice level spot in there, the beach from high to low water mark is very rocky, but you go a much shorter distance, that is you would be able to get a dock in deep water but you have a much shorter distance on the easterly end of the claim than you would on the westerly, in fact it looks to me as though it would be the most feasible place in front of the claim to build a wharf.

Q. Where?

(Testimony of C. J. Alexander.)

A. On the easterly end of it.

Q. Well, where now is the bluff you referred to—you talked about a while ago?

A. Why; the bluff extends from the end of this sandy beach here, described in the complaint, to a point just about where the continuation of the lead of the fish-trap would come if it was run up to high-water mark. [446]

Q. Well, it isn't very far off on this map, is it?

A. Well, the map as to the claim, I wouldn't dispute that, but the trap in relation to this point and this reef here and the tide lands here I don't see any similarity to the place in fact.

Q. Well, I will ask you, Mr. Alexander, if you didn't testify on the former hearing in regard to this matter, as follows: "Suppose you wanted to build a wharf out there and could build a wharf out, would your trap interfere with wharfing out from that upland?" Objection made and overruled. "Why if the wharf was built constructed on this ledge of rocks or in front of this bluff of course then it could be brought out to where the trap was in front of it." Question: "Did you say it is impossible? You want the Court to understand it is physically impossible to drive piles from the upland to the point where your trap is and you make that as a positive statement to this Court?" Answer: "I make that as a positive statement." You testified to that? A. I did, yes, sir; yes, sir.

Mr. CHENEY.—I will just ask a question of the witness, whether he understands the question the

(Testimony of C. J. Alexander.)

same as you did—this is just for my own information.

Q. You don't understand that there is—only that Judge Winn asked that question and—consider that there is any line from here up to what he has got marked the edge of the claim, that is just marked on the claim?

A. Yes, sir, exactly, I understand about that.
[447]

Q. (By Mr. WINN.) But if—did you know at the time, Mr. Alexander, that you testified in the case before us as to whether or not piles could be driven from what was at that time the end of your lead out along the line which you did afterwards drive them?

A. I had reasons for believing that they could not be driven which can be explained.

Mr. CHENEY.—We want him to explain.

Q. (By Mr. WINN.) The fact is you testified on that hearing they could not be driven out there?

A. Yes, sir; I believe I did testify something to that effect.

Q. Now, then, I will ask you if the following questions were not put to you by Mr. Burton and you answered them as follows: "I am asking the question whether it will prevent our free ingress and egress from the shore line and from the tide at that point?" Answer: "Why, I mean it will not in no way." "Mr. Burton: Now, explain to the Court why it will not?" Answer: "Because my trap is out in navigable water, because there is plenty of room inside to operate a

(Testimony of C. J. Alexander.)

vessel without interfering with the trap in any wise.”

Did you answer those questions?

Mr. CHENEY.—Object to that.

Mr. JENNINGS.—Repetition.

Mr. CHENEY.—This point is not clear now as to what point he took—that rocky point right up from the trap.

Mr. BURTON.—If the Court please, I think that is the point I understand your Honor held could answer it.

Mr. JENNINGS.—Been answered three times.

Mr. CHENEY.—Where is the point? When Mr. Burton stated the point he was evidently pointing to the map.

Mr. BURTON.—Repeat the answer again. [448]

COURT.—He may answer.

Mr. WINN.—Now, if—

A. I think I thoroughly answered the question. It was pointing to free access in and around the near end of this lead at that time that way; yes, I answered that question, that I did.

Mr. BURTON.—That is right.

Q. (By Mr. WINN.) Then, the following question: “So you want the Court to understand that there is plenty of water and will be sufficient water at the side nearest the shore line to navigate big steamers?” Answer: “I wouldn’t say big steamers, there is a limit of course, I don’t know the identical limit.” And Burton says: “Well, the ‘Cottage City’?” “The ‘Cottage City’ is gone; she will never go in.” Question: “The ‘Georgia’?” “The

(Testimony of C. J. Alexander.)

‘Georgia’; yes.” Did you testify that way?

A. I think I did, yes, sir.

Q. And that was meant, Mr. Alexander, that the “Georgia” could go around your trap and even go clear around, could get between your trap and the upland? A. That was my answer.

Mr. CHENEY.—Now, if the Court please—

Mr. WINN.—I asked him if that is—

Mr. CHENEY.—The question you read said alongside of this trap; now, he is asking a different question.

COURT.—Well, the witness is intelligent.

WITNESS.—I understand the question as I answered, as I intended it, however, that way. [449]

Q. (By Mr. WINN.) You understood it that way? A. I think so, yes, sir.

Mr. WINN.—I think Mr. Cheney didn’t but you did.

Mr. CHENEY.—If you will read it along, say right alongside of the trap.

Mr. WINN.—Well, the witness is testifying and you are not.

Mr. CHENEY.—That is all right. I want him to understand the question you have asked. You ask one question when you read the paper and then you ask another orally and change it.

Mr. WINN.—Well, the witness and I get along, Mr. Cheney, get along very well.

COURT.—Any further questions of this witness, Judge Winn?

Mr. WINN.—That is all.

(Testimony of C. J. Alexander.)

COURT.—Proceed with the cross-examination.

Cross-examination.

Q. (By Mr. CHENEY.) Now, Mr. Alexander, you were asked by Judge Winn, asked if you didn't testify on the preliminary hearing of this case that you didn't intend to extend the lead of your trap any further in shore and I believe you stated you so testified?

A. Yes, sir, I believe I testified at that time I did not intend to extend it further in shore.

Q. Now, what is the reason you testified to it that way?

Mr. WINN.—Object, incompetent, irrelevant and immaterial.

Mr. CHENEY.—This is cross-examination of the witness. [450]

COURT.—He may answer. Objection overruled.

A. That was my intention at that time, if that is the question you asked. I don't clearly understand the question, Mr. Cheney.

Q. (By Mr. CHENEY.) I asked you if you so testified, that you didn't intend to extend it any further, and if you did extend it further what was your reason for so doing?

A. That was as far as I intended to extend it at that time, for a combination of reasons and circumstances.

Q. Well, state your reasons.

A. Well, at the time of the dissolution of this restraining order, temporary restraining order, I was informed by my attorney—if you will remember—

(Testimony of C. J. Alexander.)

that there was nothing to prevent me from driving—extending my lead if I sought to up across Admiralty Island, if I so desired, that I had as much title to that upland as Mr. Barron had at that time. Now, when I went back there with my pile-driver after the dissolution of this restraining order I found that several piles, that is five or six piles in different places on that trap had worked out by the action of the sea during the period of time that this trial was in course. There was two of those particular piles that jumped out from under the end of this lead where I had finished driving on my trap; the last day I was there with a pile-driver I went in there to drive those piles. I don't remember just how many piles I had, but three or four with the driver at the time I moved in there—I drove those two, the last pile in the structure as it was when the injunction was served upon me showed—showed very hard, that is the piles did not drive far into the bottom of the sea. [451] I based my opinion largely from my previous experience there on the ground with the trap I constructed there for the Alaska Packers in former years. That was about as close as I got to the shore with that, judging the distance, and I am satisfied it was just about where the Alaska Packers' trap ended the lead, somewhere in that near vicinity. I continued with another pile and I was driving over this little hogback, apparently I found better driving again and I discovered there was another place in there between the direction of where that lead ended then and now and I got the best driving of

(Testimony of C. J. Alexander.)

any place in the trap. There was one or two piles went in there twelve or fifteen feet, something that didn't occur any place else in the trap. Now, I had occasion to examine the bottom there during the fishing season in search of an anchor that I had lost there by a boat swamping on the west side of this lead. I made note of it at the time. I think it was on the morning of the 15th of July. And I discovered in my search of the bottom for this anchor the stumps of a number of piling which had been broken or eaten off by the toredoes and which I took to be the lead line of the old Packers' trap, not knowing in fact of any other pile being driven in there before or since; which proved to be perhaps fifteen or twenty feet to the northward of my line of the present lead of my trap there now, and it is a fact, I think, the uplands make that difference. It is possible that that difference might have placed me upon the back, and that wouldn't prevent me from going in any further, that is may have put me in contact with that point running out on that old site of that trap. That wouldn't enable me to drive piles any closer, and this difference— [452] this fifteen or twenty feet to the southward, found a larger deposition of sediment and I was thereby enabled to get this line in closer to the beach.

Q. Now, in regard to what you said, what you said—I withdraw that—then at the time you did testify on the other hearing you said that the last pile you had driven was in hard ground? A. Yes, sir.

Q. And you didn't think at that time you could,

(Testimony of C. J. Alexander.)

even if you wanted to, extend it?

A. I didn't think I could from the way that pile drove and from my previous experience there I know it was a greater distance from the lead of the Packers' trap than I had driven there into the upland, I would say perhaps four hundred feet.

Q. Well, now, you were asked in regard to what you said about boats being allowed—being able to go around your lead at the time the trap—at the time of the other hearing of this case—you remember of testifying that the “Jones” could get through there?

A. Yes, sir; I remember and being an eye-witness and seeing the “Jones” and I told about one or two other small boats going around inside the lead there.

Q. Well, Mr. Alexander, when you said that you did consider that this probably obstructed this, if a person attempted to enter upon this claim between the lines that you indicated in your answer to Judge Winn's question—now, if that is the case then it wouldn't make any difference whether this lead run into shore, would it? A. No. [453]

Q. That wouldn't make any difference so far as it being an obstruction between the two outer lines that would take in the whole trap—you understand what I mean?

A. The line I make, Mr. Cheney, will cover the entire trap I think now as it stands. I took these right angle triangles off from a correct plat which we have of the surroundings there.

Q. Yes. I don't know as I make my question plain to you though I tried to, but what I am trying

(Testimony of C. J. Alexander.)

to get at is, so far as it being an obstruction to the front of this claim, entering it from Chatham Straits out here? A. Yes, sir.

Q. The only difference, now, between this present time and the present condition of your trap and the condition it was in a year ago when you testified would be this forty feet you put on the west side of the trap, so far as its being an obstruction to entering upon and to the survey of Mr. Barron's—

A. Well—

Q. You understand what I mean?

A. Yes, I understand you clearly, Mr. Cheney, and it might—it might broaden the line on the other side to the extent—

Q. Well, where the lead was extended?

A. Yes, to the extent of not to exceed twenty feet the way the angle of the lead stands.

Q. Yes. Then, if we estimate that as twenty feet, Mr. Alexander, on that side between the prolongation of the lead of these fourteen piles, or we estimate this part of the trap that you say you have added on here since the last trial, the forty feet, then it would only make an additional obstruction of sixty feet more on the frontage, the way you '[454] figure it, than what it would last year?

A. Yes, sir, and the trap as it now stands all of it covers an area of two hundred and seventy feet, yes, sir.

Q. Yes, sir. Then, your explanation of it is in your judgment it would perhaps be an obstruction to about two hundred and seventy feet of the frontage?

(Testimony of C. J. Alexander.)

A. I would look at it as such; yes, sir.

Q. And the frontage of this claim is about what?

A. Eight hundred feet, something like that.

Q. Eight hundred feet. And that is the proportion you would say it would obstruct to anyone coming in with a boat from Chatham Straits?

A. That is, yes, sir, that is it.

Q. You didn't testify on the last trial—I will ask you if you meant in answer to Judge Winn's question that a large boat like the "Cottage City" could get inside, in between your lead? A. O, no.

Q. The boat you mentioned—do you remember which boats you mentioned?

A. Well, I don't remember; the "Jones" was one I remember and I could not recall the others.

Q. The "Jones" was a boat you had out there working, driving at your trap? A. Yes, sir.

Q. Now, Mr. Alexander, you have said that in your opinion that map is not exactly correct in some respects. Now, will you just take the pointer and show the Court in what respects you consider the map is not correct?

A. Well, I consider that it is misleading, it is constructed with a prejudiced opinion in my estimation; in the first place the contour of the beach. [455]

Q. The low-water mark is that—

A. Yes, sir; isn't quite as I consider correct. In the second place, this outlying rock or reef here is shown a great deal closer to the trap than it is in reality. As a matter of fact, what it shows there, the reef, that situation between the point of the up-

(Testimony of C. J. Alexander.)

land and the fish-trap, and in actuality the outlying reef there is lying to the southward of this point of the upland and in no way obstructs the access to the shore line or uplands between the point of the uplands and the trap.

Q. In other words, you say that this reef that they have marked out here as a sort of island between the bare rock and the trap is south of this point?

A. Yes, sir.

Q. And that it don't—it don't lessen the distance between this point and the reef?

A. No, sir; in other words, to make it plainer it is a greater distance from the corner of this trap to that outlying reef than it is from the corner of the trap to this point of the upland.

Q. Marked "bare rock"? A. Yes, sir.

Q. Now, are there any other matters—any other matters you wish to point out you don't think are correct?

A. Well, I couldn't say, of course, offhand as to the angle of the trap there and this, of course, the misplacing of that reef, and this point there possibly gives a different appearance upon the whole plat in fact and I wouldn't want to render an opinion as to the angle of the trap or as to the length of it.
[456]

Q. How about it? You might step there and look at these soundings to see if you have anything to say in regard to the depth of the water they have placed there.

A. Eighteen—twenty-five—twenty-seven—thirty.

(Testimony of C. J. Alexander.)

I think those are correct or approximately correct.

Mr. WINN.—I object to the question; no foundation laid for it.

Mr. JENNINGS.—It is cross-examination of the witness.

Mr. WINN.—I never asked him a word about the soundings. I submit to the Court, unless the man has made the measurements—

Mr. CHENEY.—He has made the measurements. Do you object to it?

Mr. WINN.—I do.

COURT.—No, I think that the depth of the water there, Judge Winn, may have something to do with the accessibility to the shore line, if this man knows.

Mr. WINN.—I did not object to it on that ground, your Honor; I object to it on the ground no foundation made, hadn't measured.

COURT.—If he doesn't know he may say so.

Mr. CHENEY.—My object is that in response to the question he stated to Judge Winn he didn't consider the map correct, that is the only reason I am asking him if he has anything to say in regard to these measurements that have been placed by the person who made the map.

COURT.—He may testify if he knows anything about it.

Q. (By Mr. CHENEY.) If you know, for instance, there is eight feet at the lead pile.

A. Well, what is that eight feet?

Q. Well, that is an hour before low water, as I understand the [457] testimony?

(Testimony of C. J. Alexander.)

Mr. WINN.—No, Mr. Hill figured that as being low tide at that date.

Mr. CHENEY.—Well, if that is the way you figure it.

A. Well, it might be hard to say, Mr. Cheney, I couldn't dispute that or any other soundings, not knowing their exact position as being in relation to the trap and this point as I have said the map is misleading.

Q. You made the soundings yourself?

A. Yes, sir.

Q. But you don't know as you know where that is or that is you can't place them?

A. No, sir, I don't because they don't state where they are.

COURT.—Any further cross-examination of this witness?

Mr. JENNINGS.—Yes.

Q. Mr. Alexander, you said that the building of this trap only obstructed the entrance to that harbor so far as the two hundred feet of shore line was concerned?

A. Two hundred and seventy feet was my fair version of it, yes, sir.

Q. Now, have you examined the beach line there?

A. I have examined the beach line a great deal.

Q. Well, now, just tell the Court how that beach line is there—is on the beach.

A. Along the meander line of this—

Q. Of the whole claim—

A. —of the whole claim. Well, the first end of the claim—